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TO THE

READER.

THIS ſmall Treatiſe having met with a very favourable Acceptance, being the firſt that was ever printed in its Kind; hath encourag'd the Publiſher hereof to reviſe, correct, and ſupply every Thing that he thought was wanting to make it the moſt compleat of any Book now extant: In order thereunto, he hath carefully examined the Authorities by

the reſpective Books of the Law, and hath added many late adjudged Caſes proper to the Subject, by placing them under their convenient Heads and Chapters. And Laſtly, hath added ſeveral new Chapters, with the Acts of Parliament that relate to *Landlords* and *Tenants*, and what concerns the Preventing the Deſtruction of Houſes by Fire, and of the new Building of Houſes within the Bills of Mortality.

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THE

THE LAWS CONCERNING Landlords and Tenants.

CHAP. I.

A Diviſion of the ſeveral Kinds of Tenants and Tenures.

EVERY Subject of this Kingdom that occupieth any Lands, or inhabiteth in any Houſe or Tenement, is ſaid to be a Tenant, *Tenens a Tenendo*; becauſe he muſt hold of ſome Lord or other. *The Kinds of Tenants and Tenures.*

And divers and various are the Natures and Kinds of Tenants and Tenures in this Land at this Time; although they have been more numerous, and were indeed of exceſ-

ſive Slavery to the People, ſo that their exorbitant Cruelty hath cauſed their Diſſolution.

Villenage. Thoſe which are ceaſed to be, are Tenure in *Villenage*, where the Lord might vaſſal and enſlave his Tenant's Perſon at his Pleaſure, but not kill him.

Pillenage. *Pillenage*, where the Lord might pillage his Tenant of all his Goods.

Free-Alms. *Frank Almoigne*, or Free-Alms, was a Tenure begun, and had it's Original, either at or ſoon after the Foundation of *Monaſteries* and Religious Houſes, and extirpated with them. The Nature of it in old Time was, when a Man being ſeiſed of Lands or Tenements in his *Demeſne* as of Fee, of the ſame Land did enfeoff ſome Abbot or Prior and their Convents, or ſome Dean and Chapter and their Succeſſors, or ſome Parſon of a Church and his Succeſſors, or any other Religious Perſon who was in a Capacity to take ſuch Alms, to hold the ſame Lands and Tenements to them and their Succeſſors, *in Liberam Eleemoſynam*, in Free-Alms, or *Frank Almoigne*, of the Grantor and his Heirs: And ſuch as held in Free Alms, were bound, in Conſideration of ſuch Grant or Feoff-

Feoffment, to perform certain Divine and Religious Services and Exerciſes, for the Soul's Good, Life and Proſperity of the Grantors, and all others.

And they confirmed all their Grants with grievous *Anathema's* and Imprecations againſt all ſuch as ſhould in any Ways diminiſh or take away ſuch their Grant, or convert the ſame unto any other Uſe; which ſome believe to be none of the leaſt Cauſes, why Purchaſers of Church-Lands find ſuch ill Succeſs, and ſeldom do enjoy it to the Fourth Generation.

But, as ſaid before, this Tenure and the Religious Houſes ended together, or immediately one after the other, ſo that none can grant any Lands or Tenements *in Liberam Eleemoſynam*, at this Day.

Tenure *in Capite* and *Knight's Service*, was alſo by Act of Parliament, *Anno* 12 *Car.* 2. *cap.* 24. (together with the Court of Wards, which was dependent upon that Service) taken away, and all thoſe Tenures are now turned into Free and Common *Socage*. *Knight's Service.*

Alſo Tenure by *Grand Serjeanty*, was a Kind of Tenure by Knight's *Grand Serjeanty.*

Escuage. Service, and so was Tenure by *Escuage*, because the King had the Wardship and Marriage of such Tenants under Age; and tho' these Tenures are taken away by the said *Stat.* 12 *Car.* 2. yet the Honorary Services of Grand Serjeanty still continue.

Petit Serjeanty. But 'tis said, That Tenure by *Petit Serjeanty* is no more than a Socage-Tenure in Effect, because the Tenant is not thereby bound to do any Thing in his proper Person touching the Wars, and had not Wardship, Marriage or Relief annexed; yet this seems to be also taken away by the said Statute.

So that the more usual Tenants among us at this Day, are,

Fee-simple. Tenants *in Fee-Simple*, and in Fee-Tail.

Fee-Tail. Tenant *in Tail* after Possibility of Issue extinct.

Dower, Curtesie, Term of Life, for Years. Tenant *in Dower*, and by the *Curtesie* of *England*; Tenant for Term of Life or for Years, upon Lease in Writing, or Lease-Parol.

At Will. Tenant *at Will* by the Common Law, or by Custom.

Sufferance. Tenant *at Sufferance.*

Copy. Tenant by *Copy of Court-Roll.*

Tenants

Tenants *in Coparcenary*, *Joint-Tenants*, and *Tenants in Common*. *Coparcenary.*

Fee-Simple.

A Man that is ſeiſed in Lands or Tenements, to hold to him and his Heirs for ever, is ſaid to be Tenant in Fee-Simple; and ſuch an Eſtate is called *Feodum Simplex*. The Word *Feodum* in *Latin*, being taken to ſignifie Inheritance; and *Simplex* implies pure, plain or unmixed: And indeed Fee-Simple is the moſt pure Holding; that is, Being unmix'd, or entangled in it ſelf. But as the whiteſt Colour will be ſooneſt ſtained, ſo is this pure Tenure moſt ſubject to be ſpotted and involved in Troubles above any other; which the Law calls *Incumbrances*. Lit. Ten. Lib. 1. Cap. 1. *Fee-Simple.*

If a Man were to deal as Purchaſer with a Tenant in Fee-ſimple, he hath a happy Bargain if he meets with a Simple Tenure and a Simple Tenant; I mean, the one free from Incumbrances, and the other from Deceit; which many have found it a difficult Thing to obtain. *Incumbrances of Fee-Simple.*

I ſhall therefore, by Way of Caution, ſet down the ſeveral Troubles

and Incumbrances this pure Tenure, called *Fee-Simple*, is subject unto.

What Incumbrances. Fee-Simple may be incumbered with several Judgments, Statutes-Merchant, and of the Staple, Recognizances, Mortgages, Wills, Precontracts, Bargains and Sales, Feoffments, Fines, Amerciaments, Jointures, Dowers and many other fraudulent Conveyances, if a Knave once possess it; and last of all, may *Forfeited.* be quite forfeited for Treason.

But Fee-Simple being free from any of the abovementioned Incumbrance, is the most free, absolute and ample Estate of Inheritance that any Man can have; and therefore a Tenant in Fee-Simple is said to be *Seisitus in dominico suo ut de feodo*; that is, seised in his Demesne as of Fee.

Tenant in Fee-Tail.

Fee-Tail. All Freehold Inheritances before the Statute of *Westminster* 2. *cap.* 1. *De Donis Conditionalibus*, were Fee-Simple at the Common Law; so that Tenant in Tail was instituted by Force of that Statute: By which Statute there is a twofold Tenant in Tail, *viz.*

General

General and Special Tail.

He is ſaid to be Tenant in General Tail, who holdeth Lands or Tenements to him, and to the Heirs of his Body begotten. *General Tail.*

For if in this Caſe he marry many Wives, and have Iſſue by them all; every one of them may (the elder dying) come to inherit this Land, becauſe every one is the Iſſue engendred of his Body.

It is the ſame Caſe, if Lands or Tenements be inveſted upon a Woman and the Heirs of her Body, and ſhe have ſeveral Husbands, and Children by them all, every one of them is in a Poſſibility to inherit thoſe Tenements, being all begotten of her Body.

But where Lands or Tenements are ſettled upon a Man and his Wife, and the Heirs of their Bodies between them two lawfully to be begotten, this is Tenant in Special Tail; becauſe in this Caſe none can inherit but ſuch Children as are by this Man begotten upon the Body of this Wife named in the Grant: And if that Wife die, and the Man taketh another Wife, and hath Iſſue of her *Special Tail.*

Body, the Iſſue by the later Wife cannot inherit by Virtue of ſuch a Grant. And if the firſt Husband die and the Wife marry again and have Iſſue by a ſecond Husband, that Iſſue cannot inherit. *Lit. Ten. l.* 1. *c.* 2. *f.* 5. *a.*

Special Tail with Limitation.

There be ſeveral other Eſtates in Special Tail, according to the Deviſes, Limitations and Conditions, invented and ſettled by the *Donor*; as ſometimes to a Man and his Wife, and the Heirs Males of their Bodies, between them two to be begotten: In this Caſe the Females cannot inherit. *Et econtra:* For if limited to Heirs Females of their Bodies, then the Males cannot inherit.

So that if Lands be inveſted upon a Man and his Heirs Males of his Body, and he hath Iſſue two Sons, and dieth, the eldeſt enters according to the Grant, and hath Iſſue a Daughter, and dieth; this Daughter ſhall not inherit the Land, but the Brother, becauſe he is the Heir Male.

Tail becomes extinct.

And if a Man hath Lands granted to him, and to his Heirs Males of his Body, and he hath no Son, but only a Daughter, and the Daughter hath a Son, and dieth, living her Father, and after that the *Donee* dieth; in this

this Case the *Donee* dying without Issue Male in the Law, the Son of his Daughter, which is the Grandchild, shall not inherit, but the Entail is extinct, and the Land shall revert to the *Donor*.

Tail Tenures Incumbrances.

These Grants in Tail are the Cause of much Strife, and stir up many chargeable Suits, tho' in my Judgement they are useless. For the Intent of the *Donor* is seldom observed in them, he intending to preserve the Memory of his own Name to Perpetuity; which cannot be, since a Fine and Recovery will now bar and *dock* it.

Stat. de Donis.

For the said Statute *De Donis, &c.* being made 13 *Edw.* 1. established a general Perpetuity in Estates descendible for all that would make it; so that most Estates were consequentially entailed *in perpetuum* by the *Donor* on the Heirs of the *Donee*; which being against the Policy and Reason of the Common Law, became the Occasion of many Mischiefs; for Lords were often thereby defeated of their Escheats and other Duties and Services, and Purchasers and Tenants often lost their Estates, and were evicted by the Heirs of the Grantors and Lessors;

for the Anceſtor could not bind his Eſtate farther than for his own Life.

Theſe Miſchiefs were often attempted to be redreſſed in divers Parliaments, and divers Bills to that End were exhibited, which were always rejected on one Pretence or other, But the true Reaſon was, The Lords and Commons knowing that their Eſtates-Tail were not forfeitable for Felony or Treaſon (as Eſtates in Fee-Simple were;) and finding they were not liable to the Debts, Incumbrances, Sales, Alienations or Leaſes of their Anceſtors, did always reject ſuch Bills.

Common Recovery. This continued till about the 12th of *Ed.* 4. when the Judges upon Conſultation among themſelves did agree and reſolve, That an Eſtate-Tail might be docked and barred by a Common Recovery, and that by Reaſon of the intended Recompence in Value, a Common Recovery was not within the Reſtraint made by the ſaid Statute *De Donis Conditionalibus.*

If Tenant in Tail General or Special die without Iſſue, the *Donor* or his Heirs ſhall enter as in their Reverſion; for in every Gift in the Tail,

Tail, without more saying, the Reverſion of the Fee-Simple is in the *Donor*. *Lit. Ten. l.* 1. *c.* 2. *f.* 3. *Entry by the Donor.*

Tenant in Tail after Poſſibility of Iſſue extinct.

When Lands and Tenements be granted to a Man and his Wife in Special Tail, and one of them die before they have Iſſue, the Survivor, is Tenant in Tail after Poſſibility of Iſſue extinct; but if they have Iſſue, during the Life of the Iſſue the *Survivor* cannot be ſaid to be Tenant in Tail after Poſſibility of Iſſue extinct. But if the Iſſue die without Iſſue, and leave none to inherit by Virtue of the Entail, then the ſurviving *Donee* is Tenant in Tail after Poſſibility of Iſſue extinct. *Lit. Ten. l.* 1. *c.* 3. *f.* 7. *Poſſibility of Iſſue extinct.*

And none can be Tenant in Tail after Poſſibility of Iſſue extinct, but one of the *Donees* in Special Tail; which Tenant in Tail after Poſſibility of Iſſue extinct is not chargeable for committing of Waſte, becauſe the Inheritance was once in him; but if he doth alien in Fee, it is a Forfeiture of his Eſtate, and the Heir in Reverſion may enter. For ſeveral *Donee in Special Tail.*

ſeveral other Privileges and Qualifications of this Tenant, *Vide Co. Litt. f.* 27. *b. Fitz. Waſte* 125. *Kitch. f.* 228.

Tenant by the Courteſie of England.

Tenant by the Courteſie.

When a Man marries a Wife ſeiſed in Fee-Simple, or in general Fee-Tail, or one that is Heireſs unto Lands or Tenements in Special, and hath a Child by the ſame Wife Male or Female born alive, and the Wife die; whether the Child be living or dead, the Husband ſhall hold the ſame Lands during his Life, as Tenant by the Courteſie of *England*, which is a Tenure uſed in none other Country but *England*: And altho' the Child die as ſoon as it is born, if it were but heard cry, the Huſband ſhall hold the Lands after his Wife's Deceaſe during his Life as Tenant by the Courteſie; the Crying of the Child being a ſufficient Teſtimony of its being born alive. *Lit. l.* 1. *c.* 4. *f.* 8.

Tenant in Dower.

Tenant in Dower.

This Kind of Tenant is always of the Feminine Gender; and is, when a Man

a Man who is ſeiſed of Lands or Tenements in Fee-Simple, or in General Tail, or his Heir in Special Tail, marries a Wife and dies; the Wife, after the Death of her Husband, ſhall have, during her Life, the third Part of ſuch Lands or Tenements as her Husband had during the Coverture, whether ſhe had any Iſſue by him or not, ſo ſhe be above Nine Years of Age at her Husband's Death. *Lit. l.* 1. *c.* 5. This is Dower at the Common Law, but by Cuſtom in many Places it is otherwiſe; for in ſome Places ſhe ſhall have the Half, and in others the Whole; and in all theſe Caſes ſhe is Tenant in Dower.

Dower at Common Law.

In *Kent* it is the Cuſtom for the Woman to have Half her Husband's Lands *durante viduitate*, ſo long as ſhe continues a Widow, and without Child; but if ſhe marry again, ſhe loſes all: So likewiſe is the Cuſtom there, if a Man marry a Wife having an Eſtate in Lands, *&c.* and ſhe die without Iſſue, he ſhall have Half while he remains ſole; but if he marry again he loſeth all. And in *Kent* they ſay, the Reaſon thereof is, becauſe they do not love that their Lands ſhould help to maintain any Chil-

Dower by the Cuſtom.

Children, but ſuch as are of their own Getting; but how ſure they are thereof, *Ignoramus*.

That by the Cuſtom of ſome Towns or Boroughs, ſhe ſhall have the Whole. See more of this, *Co. Lit.* 31, 33. That there needs no Livery and Seiſin to an Aſſignment of Dower. *Co. Lit.* 35. And that it muſt be of ſome Part of the Land, or of a Rent iſſuing out of the ſame. *Ibid. & Dy.* 91. See more in *Lit.* on *Ten. l.* 1. *c.* 6. *f.* 11. and *Co. Lit.* on the Chapter of *Dower*.

The Wife is not barred of her Dower tho ſhe accept a Legacy bequeathed her inſtead of it.

One deviſed a Sum of Money to his Wife on Condition ſhe would renounce her Dower; ſhe accepted of the Legacy, and yet the Chancery decreed that ſhe was not barred of her Dower thereby: It was farther held that ſhe being an Orphan, and her Portion remaining ſtill in the Chamber of *London*, it ſhould be conſidered as a Debt due to her before Marriage, and remain to her; and that the Executors of the Huſband were not entitled to it. *Pheaſant* verſus *Pheaſant*, *in Canc. Trin.* 22 *Car.* 2. *Caſes in Chancery*, 1ſt Part, p. 181.

Tenant

Tenant for Life.

He that holdeth Lands or Tenements for the Term of his own Life, or for the Term of the Life of any other Perſon: In this Caſe the Leſſee either for Term of his own Life, or for another's, is Tenant for Term of Life: And this Tenant for Life hath in him the Freehold, this being the loweſt Degree of Freehold. *Lit. Ten. l.* 1. *c.* 6.

If a Man be Tenant for Term of his own Life, he hath a higher Eſtate than he that is Tenant for the Life of another. *Co. Lit.* 42. *a.*

Note, A Leaſe for Life muſt be executed with Livery, becauſe an Eſtate for Life is a Freehold. *See after p.* 18. *Livery.*

In a Grant for Term of Life, it is ſaid to be from Leſſor to Leſſee. *Note*, there is *Feoffor* and *Feoffee*, *Donor* and *Donee*, *Leſſor* and *Leſſee*; there is likewiſe *Grantor* and *Grantee*, *Obligor* and *Obligee*, *Mortgagor* and *Mortgagee*. *Leſſor and Leſſee.*

He that enfeoffeth another in Lands or Tenements, is called the *Feoffor*; he to whom the Feoffment is made, is the *Feoffee*. *Feoffor and Feoffee.*

So

Donor and Donee. So when a Man giveth Lands or Tenements to another in Tail, he is called the *Donor*; and he to whom the Gift is made, is the *Donee*.

Grantor and Grantee. And likewise he that letteth to another any Lands or Tenements to hold for Term of Life, for Years, or at Will, is called the *Lessor*; and he to whom the Lease is made, is called *Lessee*: Which Lessee for Life (as I said before) is Tenant of Freehold.

Mortgagor and Mortgagee. So also he that pawneth Lands to another, is called *Mortgagor*; and he to whom it is pawned, is called the *Mortgagee*.

Tenant for Years.

Tenant for Years. Tenant for Term of Years, is when a Man demiseth, and letteth any Lands or Tenements to another to hold for a certain Number of Years agreed upon between the Lessor and the Lessee; by Force and Virtue of which Lease, the Lessee entreth into the said Tenements.

This Lease for Term of Years may be granted by Word of Mouth, and this is called a *Lease-Parol*; which formerly bound the Lessor so long as the Term was accorded for, if the Witnesses

Witneſſes lived to prove the Leaſe-Parol.

But now the more ſafe and uſual Way is to take a Leaſe by Deed indented, which needs no other execution but only Sealing and Delivery. For by Virtue of that Leaſe, the Tenant may enter whenſoever he will.

Leaſes Parol.

Alſo, *by the Statute of Frauds and Perjuries*, 29 Car. 2. c. 3. *Leaſes-Parol, or by Word of Mouth, will be void if they exceed Three Years from the Making; yet two Third Parts of the improved Value of the Thing demiſed, muſt be reſerved to the Landlord.* See after, Chap. 2. *and* Chap. 8.

And no Leaſes, Eſtates or Intereſts, either of Freehold or Terms for Years, or any uncertain Intereſts not being Copy-hold or Cuſtomary Intereſts, ſhall be granted or ſurrendred, unleſs it be by Deed, or Note in Writing, ſigned by the Party ſo granting or ſurrendring the ſame, or their Agents lawfully authorized by Writing, or by Act and Operation of Law.

And no Action ſhall be brought to charge any Perſon upon any Contract or Sale of Lands, Tenements or Hereditaments, or any Intereſt in or concerning them, unleſs the Agreement upon which the

the Action shall be brought, or some Memorandum *or Note thereof, shall be in Writing, and signed by the Party, or some other Party by him lawfully authorized.* See Chap. 8. for further observations on this Statute.

Every one seised of an absolute Estate in Fee-Simple in his own Right, may make a Lease for as many Years as he pleaseth, provided it be not a Body Politick, lest by exceeding, it seem a Devise in *Mortmain*; and some say for a Hundred, others, if but for eighty Years, 'tis *Mortmain*; and in this Case the Chief Lord may enter for the Forfeiture, unless they have purchased Licence from the *King* and the said *Chief Lord. See* 2 *H.* 8. *Mortm.* 39. *Stat.* 23 *H.* 8. 10, *&c. Fitz.* 221 *F.* 222. *D.* 223. *E.*

Mortmain.

But now by the Stat. 7 *&* 8 *W.* 3. c. 37. *The King alone, his Heirs and Successors, may grant to any Person or Persons, Bodies Politick or Corporate, their Heirs and Successors, Licence to alien in* Mortmain, *and also to purchase, acquire, take and hold in* Mortmain, *in Perpetuity or otherwise, any Lands, Tenements, Rents, or Hereditaments whatsoever, of whomsoever the same shall be holden; and such Lands, Tenements,* &c.

so

ſo aliened or acquired and licenſed, ſhall not be ſubject to any Forfeiture by reaſon of ſuch Alienation or Acquiſition.

A Leaſe for Term of Life muſt be executed by *Livery* and *Seiſin*: becauſe the Freehold paſſeth with that Leaſe, which it cannot do whithout *Livery* and *Seiſin*. *Livery and Seiſin in Leaſe for Life.*

This was the Caſe of *Allen* and *Waller* at the *Lent*-Aſſiſes at *Maidſtone* 1654. *Waller* brought an *Ejectione Firmæ* againſt *Allen*; the Defendant proved a Leaſe-Parol at a certain Rent during his Life: Which laſt Word of the Defendant's Witneſs gave the Verdict againſt him, becauſe none can be Tenant for Life, without *Livery* and *Seiſin*.

Alſo if a Man make a Leaſe to one for Years, the Remainder to another for Life, or in Tail, or in Fee, here the Leſſor ought to make *Livery* and *Seiſin* to the Leſſee for Years, or elſe nothing ſhall paſs to him in Remainder, though the Leſſee enter and enjoy his Term of Years; but the Freehold and the Reverſion remains in the Leſſor. But if the Leſſor make *Livery* and *Seiſin* to the Leſſee then the Freehold paſſes over to them in the Reverſion, according to the Grant. For the Manner of

Livery

Livery and *Seiſin*, ſee *Pract. Reg.* laſt publiſhed, 397.

That *Livery* muſt paſs a preſent Freehold, and cannot commence *in futuro*, Hob. 171.

How a Corporation may make *Livery* and *Seiſin* by Attorney, *Pract. Reg.* 397.

If a Tenant for Years of Lands conſent, that *Livery* and *Seiſin* ſhall be made unto him that hath purchaſed the Reverſion of thoſe Lands let unto him, and it be made accordingly, this is a good *Livery* and *Seiſin* to make the Reverſion paſs, altho' the Tenant for Years do not go off from the Land at the Time when the *Livery* and *Seiſin* was made. *Ibid.* See after.

Leaſe for Years takes Right after the Delivery.

Likewiſe if a Man make a Leaſe of Lands or Tenements to another for Term of Years, and the Leſſor die before the Leſſee enter into the Tenements; nevertheleſs he may enter, notwithſtanding the Death of the Leſſor, becauſe the Leſſee hath Right to the Tenements by Virtue of his Leaſe, immediately after the Sealing and Delivery of it. *Vide Chap.* 2.

Tenant

Tenant at Will.

When a Man demiſes Lands to another to hold to the Leſſee at the Will of the Leſſor, *vel econtra*, and by Virtue of this Leaſe the Leſſee is in Poſſeſſion; here the Leſſee is Tenant at Will, and hath no certain Eſtate in the Tenements he holdeth, but the Leſſor may eject him when he pleaſes; neither can the Leſſor force him to ſtay longer than he pleaſes. *Co. Lit.* 55. *a.* *Tenant at Will.*

But if the Leſſee ſow the Land, and the Leſſor eject him out afterwards before the Corn be ripe, the Leſſee ſhall neverleſs have his Crop, and ſhall have free Egreſs and Regreſs to cut and carry it away, becauſe he knew not when the Leſſor would enter upon him. *He that ſows ſhall reap, if Tenant at Will.*

It is ſaid, That if one be in Poſſeſſion of the Lands of another, and hath uſually paid a Rent unto him for theſe Lands, altho' it cannot be expreſly proved that the Lands were demiſed at Will to him that is thus in Poſſeſſion of the Lands, *viz.* That he ſhould hold them as long as both Parties ſhould pleaſe; yet if the Payment of a Quarter or Half a Year's

Rent can be proved, this will be a good Evidence of a Leaſe at Will. *Pract. Reg.* (the 4th Edition) 403.

Not ſo in Tenants for Years.

But if a Tenant for Years ſow his Land ſo near the End of his Term, that his Leaſe expire before the Corn be ripe, he ſhall not come to reap it; but the Leſſor, or other who hath the Reverſion, ſhall have the Crop, becauſe the Leſſee knew certainly the End and Determination of his Term and Leaſe.

In like manner if a Houſe be let to a Man to hold at Will, and the Leſſee enters the Houſe, and bringeth in thither his Goods and Houſehold-ſtuff, and afterwards the Leſſor ejects him out; here he ſhall have Liberty of Egreſs and Regreſs to fetch away his Houſhold-ſtuff, Utenſils, *&c.* and if ſuch Tenant die, the like Liberty is given to his Executors, *&c. Lit. Ten. p.* 15.

Alſo if one ſeiſed in Fee-Simple, Fee-Tail, or for Term of Life, in an Houſe, and hath Goods in that Houſe, and makes his Will, appointing his Executors, and dies; now to whomſoever the Houſe deſcends, the Executors ſhall have Liberty in ſome reaſonable Time to enter and carry away the Goods.

And

And if a Man by Deed of Feoffment grants certain Lands to another, and delivers him the Deed, but executes it not by *Livery* and *Seisin*, the Feoffee in this Case may enter on that Land, and hold it at the Will of the *Feoffor*; but the *Feoffor* may eject him out again when he will.

Tenant at Will not bound to Repairs.

If a Man dwell in a House as Tenant at Will, he is not bound to repair the said House, as a Tenant for Term of Years is bound to do.

Waste.

But if a Tenant at Will shall commit voluntary Waste, as to pull down Houses, and cut, grub, fell, or destroy Trees, the Lessor may bring his Action of Trespass against him for so doing, For tho' a Tenant at Will is dispunishable for permissive Waste, yet he shall answer for voluntary Waste. *Vide post, Chap. 6.* Also the Lessor upon a Lease at Hill, if he hath reserved a yearly Rent, may either distrain, or bring an Action of Debt for the same, if it be in Arrear, which he pleases.

Tenant at Sufferance

Tenant at Sufferance.

Tenant at Sufferance is he who comes in by lawful Lease, and keepeth Possession after his Lease is expired,

and wrongfully holdeth over: As Tenant for Life of *J. S.* who holdeth over after the Death of *J. S. Co. Lit. f.* 57. *b. Kitch. f.* 238.

The Leſſor cannot have an Action of Treſpaſs againſt a Tenant at Sufferance before his Entry into the Premiſes. *Co. Lit.* 57. *b.*

Alſo if one leaſes at Will and dies, and the Leſſee continues in Poſſeſſion, tho' the Leaſe be determined by the Death of the Leſſor, yet the Leſſee is Tenant at Sufferance. *Ibid.*

But if the King's Leſſee for Years or Life holds over his Term, yet he is not Tenant at Sufferance, but an Intruder; for no Laches of Entry may be imputed to the King. *Ibid.*

And if a Guardian after full Age of the Heir, continues in Poſſeſſion, yet he is not Tenant at Sufferance, but an Abator; for his Eſtate is created by Act in Law. *Ibid.*

If the Husband leaſes for Years the Lands of his Wife, rendring Rent, and then the Wife dies, the Husband ſhall not have Debt for the Rent incurr'd after, for his Eſtate is gone; and it ſeems the Leſſee is become Tenant at Sufferance. 1 *Roll. Abr.* 591. *B.* 4.

If

If one covenants to permit and ſuffer another to have, hold and occupy certain Lands, *à die datus*, for Life; this is but a Covenant, and no Leaſe, and ſo the Law expects no Livery thereupon; and therefore he ſhall not be Tenant at Will, but only by Sufferance. 1 *Roll. Abr.* 859. *T.* 10.

Alſo if *A.* bargains and ſells Lands to *B.* by Way of Mortgage, on Condition to pay ſeveral Sums yearly for certain Years; and there is a Covenant in the Deed, That *B.* ſhall not take any Profits of the Land, till Default in ſome of the Payments; This is no Leaſe at Will; for it is not that *A.* ſhall take the Profits, but only that *B.* ſhall not take them, which ſounds in Covenant, and ſo *B.* is Tenant at Sufferance only, and not Tenant at Will. *Ibid.* 12.

Tenant by Copy of Court-Roll.

This is a very ancient Tenure, and depends only upon Cuſtom; and there are ſo many and various Kinds of Cuſtoms in Copyholds in ſeveral Manors and Countries, that it would take up a large Volume to diſcourſe of them all; which is not *Tenant by Copy of Court-Roll.*

now our preſent Intention, but we ſhall refer that Subject to a further Opportunity, and here ſhortly in general Terms ſet forth the Nature of a Tenant by Copy of Court-Roll. In a Manor wherein there is a Cuſtom, and hath been ſo uſed Time out of Mind (for nothing can be a Cuſtom, unleſs it be *Tempore quo non extat Memoria*, Time out of Mind) that certain Tenants within the ſaid Manor have uſed to have Lands or Tenements, to hold to them and their Heirs in Fee-Simple or Fee-Tail, or for Term of Life, or upon any other Condition, at the Will of the Lord after the Cuſtom of the ſame Manor, ſuch Tenants are called *Copyholders*; that is, Tenants by Copy of Court-Roll: For a Copy of the Court-Roll is all the Evidence they have for their Eſtates in the ſaid *Lands*. *Lit. Ten. lib.* 1. *cap.* 9.

Cuſtom quid, vide poſtea, 30.

Now a Tenant by Copy of Court-Roll may not alien his Eſtate by Deed; for if he do, it is a Forfeiture to the Lord, and the Lord may enter and take the Forfeiture. *Ibid. & Co. Lit.* 59. *a.*

Copyholder cannot alien by Deed.

But if any Tenant by Copy of Court-Roll will alien his Lands, he may

may do it by a Surrender into the Hands of the Lord, to the Uſe of him that ſhall have it: And any Kind of Eſtate that a Freholder can make of his Land by Deed, a *Copyholder* may do the ſame by Surrender. *Lit. & Co. ut ſupra.* *But by Surrender to the Lord.*

The Tenant by Copy of Court-Roll is alſo bound by the Cuſtom to repair his Houſes; and if he ſuffer any Tenement or Houſe to fall down for Want of Repair, or if he pull it down, he forfeits his Copyhold to the Lord of the Manor. *Bound to repair.*

The Tenant is as well inheritable as he that hath Frank-Tenement by the Common Law, if he obſerve the Cuſtom of the Manor, and perform and pay his Services. 4 *Co. Rep.* 21, 22. &c. *See after* 30. &c. *Inheritable.*

There are ſeven Properties incident for Maintenance of a good Cuſtom.

Firſt, It muſt be reaſonable.

Secondly, It muſt be certain.

Thirdly, It muſt be according to Common Right.

Fourthly, It muſt be ongood Conſideration.

Fifthly, It muſt be compulſory.

Sixthly, It muſt be without Prejudice to the King.

Seventhly, It muſt be to his Profit, that claimeth the ſame.

In Cuſtoms, there is Uſer, Non-Uſer, Abuſer *and* Interuſer.

Uſer, Is when, according to Time and Occaſion, a Cuſtom is uſed.

Non-Uſer, Is when, for Want of Time and Occaſion, or through Negligence or Forgetfulneſs, a Cuſtom is not uſed.

Abuſer, Is when, a Cuſtom is ill uſed; for as Uſer doth nouriſh a Cuſtom, ſo doth Abuſer deſtroy a Cuſtom.

Interuſer, Is in ſome Caſes, where a Cuſtom may be uſed in one Sort, and ſometimes in another, and yet a good Cuſtom, if there be good Conſiderations for the Exchanging thereof at Times.

Fine at the Lord's Will.

If the Lord have uſed, at the Admiſſion of his Copyhold Tenants, ſometimes to take for a Fine Two Pence, or ſometimes Four Pence for an Acre, ſometimes Twelve Pence an Acre; this Uſer is ſo uncertain, that it makes the Fine Arbitrary at the Lord's Will.

Cuſtom

Cuſtom to pay a Fine according to yearly Value, good. *Pract Reg.* 174.

If the Lord of a Manor have uſed, Time out of Mind, to admit his Copyhold Tenants without Fine; this Uſage ſhall bind the Lord, as well as a Fine certain. *Admiſſion without Fine.*

If the Lord have uſed to have certain Work-Days of his Tenants, and that hath not been uſed by the Space of Twenty Years laſt paſt; yet that *Non-Uſer* is no Diſcharge to the Tenants, ſo that there be any alive that can remember the ſame. *Work of Tenants.*

If the Tenants have uſed, when they ſow their Lands, to pay the Lord Rent-Corn, and when it lieth in Paſture, to pay their Rents in Money, this is a good *Interuſer.* *Interuſer for Rent.*

If the Tenants have uſed to pay their Lord every Fourth Year a double Rent, and every Sixth Year an half Rent, this is a good *Interuſer.* Idem.

If the Tenants have uſed to have Common of Paſture in their Lord's Woods for their Horſe-cattle, and they put in their Neat-Cattle, and deſtroy the Woods, this is an Abuſer: But it is but finable, and no Forfeiture of the Common, no more than if they have a Common for a certain *Abuſer by Cattle.*

Number of Beasts in the Lord's Soil, and they exceed the Number; this Abuse by the Surcharging is only finable, and no Forfeiture.

Forfeiture. If a Man have a Fair to be used Two Days, and he keeps it Three Days, this Abuse is a Forfeiture.

Customs must be reasonable. Every good Custom is grounded upon good Reason, and that shall be said in Reason a good Custom, that in Reason is a good Law; for Law and Custom be of that Affinity, as both do allow like Reason, and both do forbid like Inconveniences; and the final Effect of both is, to discuss and to discern every Man's true Right, and to give to every Man that which is his own; for although Custom in some Cases differs from Law, and doth admit Execution of some Acts without some Ceremonies required by the Law; yet the End and Effect of Custom is to maintain the like Reason, and avoid the like Inconveniences as the Law doth.

For Services. If the Tenants of a Manor will prescribe to hold without paying any Rents or Services for their Copyholds, this is no good Custom: But to prescribe to hold by Fealty for all

all Manner of Services, is good and reaſonable.

If a Lord will preſcribe never to hold a Court but when it pleaſeth himſelf, this is not good: But to preſcribe never to hold a Court for the ſpecial Good of any one Tenant, except the ſame Tenant will pay him a Fine for the ſame; that is good and reaſonable. *To hold a Court.*

If a Copyholder ſurrender his Land to the Uſe of a Stranger, in Conſideration that the ſame Stranger ſhall marry his Daughter before ſuch a Day; if the Marriage ſucceeds not, the Stranger takes no Benefit by the Surrender. But if the Surrender be in Conſideration that the Surrender ſhall pay *ſuch a Sum* of Money at ſuch a Day; though the Money be not paid, yet the Surrender ſtandeth good. Many Cuſtoms there are, which at the Beginning were voluntary; and now, by Continuance, are grown compulſory: *Quæ initio fuerunt voluntatis ex poſt facto fuerunt neceſſitatis*, ſaith the Civil Law: Which alſo in many Caſes doth agree with the Common Law. *To ſurrender.*

Wilful Denying of Services is a Forfeiture. *Lit. Rep.* 295. *Forfeitures.*

By Copyholders, &c. And if a Copyholder convert Part of his Land into a Fiſhery, 'tis a Forfeiture. *Lit. Rep.* 268.

But if Tenant for Life of a Copyhold ſuffers a Recovery as Tenant in Fee-Simple, this is no Forfeiture. 1 *Mod. Rep.* 199. If a Fold-Courſe is not due of Common Right, but of Cuſtom, and there is Diſturbance for it, 'tis no Forfeiture. *Lit. Rep.* 267.

And of all Forfeitures committed by Copyholders, the Lord only is to take Advantage.

Remainder. Alſo if he in Remainder entreth upon a Tenant for Life of a Copyhold, and maketh a Surrender, nothing paſſeth. *Mod. Rep.* 199.

Admittance. *Note*, An Admittance of Tenant for Years, is an Admittance of him in Remainder. 1 *Vent.* 269. 1 *Mod.* 102, 120. 4 *Co.* 23. 3 *Cro.* 504.

Sole Feeding. Cuſtom for Copyholders to have ſole Feeding in a certain Waſte; it is not needful to alledge that the Beaſts were Levant and Couchant. *Vid.* 2 *Lev.* 2, 67. where alſo it is ſaid, Copyholders may licenſe others (without Deed) to put in their Beaſts, and may exclude their Lord. 1 *Vent.* 165. 2 *Saund*, 326, 327. But if a Man claim only Common Appurtenant,

Licence for Commoning Beaſts.

purtenant, or Part of the Herbage, he muſt not ſay for his Cattle Levant and Couchant; and *fol.* 328. ſays, The Licence ought to be by Deed.

Lands do not appear to be Copyhold, by ſaying, They were held according to Cuſtom, unleſs it be laid at the Will of the Lord. *Idem* 144.

Forfeiture.

In what Caſes, and when the Lord ſhall ſeize the Copyhold Eſtate of his Tenant for Felony or Treaſon. *See* 2 *Vent.* 38. 1 *Lev.* 263.

Remainders limited.

A Remainder limited to one for the Life of a Tenant for Life may be good by Way of Remainder, becauſe a Tenant for Life may forfeit by alienating in Fee, and then he in Remainder may enter and enjoy; but this Reaſon holds not in Copyholds; For if a Tenant for Life of a Copyhold commits a Forfeiture of his Eſtate, the Lord of the Manor ſhall take Advantage of the Forfeiture and not he that had the Remainder or Reverſion. 1 *Saund.* 151.

Entry by Remainder Man.

Alſo a Lord may grant Copyhold forfeited before Seizure. 1 *Lev.* 26. But *Strode* ver. *Denniſon.* 3 *Lev.* 94. Copyholder for Life was attainted of Felony, and adjudged, That he in Reverſion might take Advantage and enter; for the Eſtate for Life

was determined by the Attainder, altho' it appeared the Felony was pardoned. *See after, Copyholder convicted.*

Felo de se. No Forfeiture of a *Felo de se* happens before an Inquiſition is taken and returned. *Saund.* 278, 362.

Habendum. The Husband takes Copyhold Lands of the Lord, to whom the Lord grants the Seiſin to hold to the Husband and Wife; 'tis a good Grant to the Wife, altho' ſhe is not named till after the *Habendum.* 1 *Saund.* 151.

Seizure. A Lord without a Cuſtom may ſeize the Lands until the Tenant comes in to be admitted, but cannot ſeize them as forfeited without a Cuſtom. 1 *Lev.* 63.

Surrender by him in Remainder. If he in Remainder of a Copyhold ſurrenders his Remainder for the Uſe of the Tenant for Life, and after his Deceaſe to the Uſe of himſelf and his Wife, the Eſtate limited to the Tenant for Life is void; but the Eſtate limited to the Husband and Wife good by Way of a preſent Eſtate, but not by Way of a Remainder. 1 *Saund.* 150, 151, 152.

But a Surrender of a Copyhold in Fee, from the Time of his Death, is void. *Idem.* 151.

A Co-

A Copyholder convicted of Felony, had Clergy allowed before Attainder; and the Court were of Opinion, That 'twas no Forfeiture without a ſpecial Cuſtom. 1 *Lev.* 263. *Copyholder convicted.*

If a Covenant or Agreement be to ſurrender a Copyhold to the Uſe of *A.* then a Surrender into the Hands of Two Copyholders, according to the Cuſtom, is ſufficient. 1 *Lev.* 293. *Surrender.*

A Copyhold Eſtate cannot be ſurrendred to another by Attorney without Deed; but one may be admitted to a Copyhold Eſtate without Deed. *Pract. Reg.* 170. *Admittance.*

Admittance to a particular Eſtate, is Admittance to the Remainder; and no Fine ought to be paid for Admittance to a Remainder without ſpecial Cuſtom; and a Refuſal to pay a Fine upon a reaſonable Doubt of the Cuſtom, is not a Forfeiture. 3 *Lev.* 308. *No Fine due.*

Copyhold Land of the Tenure of *Borough-Engliſh*, ſurrendered to the Uſe of another Perſon and his Heirs, who dies before Admittance, the Right ſhall deſcend to the youngeſt Son. 1 *Mod. Rep.* 102. 3 *Keb.* 263. 4 *Co.* 22. *b.* *Borough-Engliſh.*

If

Surrender. If a Copyholder for Life ſurrender to the Uſe of another who is admitted, by this the firſt Copyholder's Eſtate is clearly determined; but if Copyholder in Fee ſurrenders to the Uſe of another for Life, after his Death he ſhall have it again. *King* and *Lord*'s Caſe. *Hill.* 5 *Car.* 1. *B. R. Rot.* 793. *Cro.* 1. *Par.* 148.

By an Infant. If an Infant ſurrender Copyhold Land to another who is admitted, this is not good to bar the Infant, for he may enter at his full Age. *Goole* and *Grane*'s Caſe. *Moor*'s *Rep.*

By Husband. If a Woman Copyholder take an Husband who ſurrenders, this ſhall be no Diſcontinuance to the Wife, nor her Heirs. 35 *Eliz. Bullock* and *Dibley*'s Caſe. 4 *Co. Rep.* 23.

Entry by Heir. The Lord of a Manor ſeized a Copyhold without Cauſe, and granted it to another in Fee, the Grantee died, and his Heir was admitted: Then the firſt Copyholder died, and his Heir entred upon the Heir of the Grantee, and ſurrendered to the Uſe of a Stranger; and here the Heir's Entry before Admiſſion was adjudged lawful, and his Surrender to the Uſe of a Stranger good; and it was reſolved, That the Deſcent of a Copyholder doth

not toll or take away the Entry of another Copyholder who hath Right. 2 *Cro. Par.* 36. and *vide* 4 *Co. Rep. fol.* 23.

If a Copyholder for Life cut down Trees, the Lord may carry them away. *Pract. Reg.* 170.

Waſte.

If a Copyholder commit Waſte, whereby a Forfeiture accrueth to the Lord, who afterwards accepteth of Rent; this doth not bar the Lord, but he may enter for the Forfeiture of the Tenant, notwithſtanding the Acceptance of the Rent. *Mich.* 29 *El. in B. R. Godbolt* 47.

Forfeiture and Acceptance.

If a Copyholder forfeit his Eſtate, and then ſurrenders to the Lord who accepts it, not knowing of the Forfeiture; yet this is no Diſpenſation of the Forfeiture. *Hill.* 4 *Car.* 1. *Rot.* 496. B. R. *Matthews* and *Weaton*'s Caſe. 1 *Cro. Par.* 169.

Copyhold extinct.

A Copyholder in Fee took a Leaſe for Years of a Manor: Reſolved the Copyhold was extinct for ever, and not only during the Leaſe. *Hide* and *Newport*'s Caſe. *Moor*'s *Rep.*

Advantage to Feme Covert.

If a Feme Copyholder in Fee take an Husband, who makes a Leaſe for Years contrary to the Cuſtom; after the Husband's Death, this Forfeiture ſhall not bind the Feme and her

her Heirs, but ſhe ſhall have it again after her Husband's Death *non obſtante* the Forfeiture; and ſo it was adjudged *inter Savern* and *Smith* in the Exchequer. *Cro. Rep.* 1. *Par.* 7. *Paſch.* 1 *Car.* 1.

Copyhold determined.

A Copyholder in Fee ſurrendred to the Lord of the Manor his Copyhold Eſtate, and the Lord made a Leaſe for Years of the Manor and of the Copyhold, by the Name of his Tenement called *H.* and whether by this the Copyhold was determined or no, was the Queſtion: And it was held that it was not; becauſe when the Lord let the Manor, it was included as Parcel thereof; but if he had made a Leaſe for Years of the Copyhold by it ſelf, that had deſtroyed the Copyhold, for it was then during that Time ſevered from the Manor, and ſo could never again be demiſable by Copy. *M.* 14 *Car.* 1. *in B. R. Lee* and *Boothley*'s Caſe. *Cro.* 1 *Par. fol.* 375.

Eſtate forfeited, revived.

If a Copyholder make a Leaſe for Years, which is a Forfeiture at the Common Law, and after the Lord makes a Feoffment, or a Leaſe for Years of the Freehold of this Copyhold, in this Caſe the Feoffee or Leſſee of the Lord ſhall not take Ad-

Advantage of the Forfeiture; for the Leaſe of the Freehold made by the Lord before Entry, is an Aſſent that the Leſſee of the Copyholder ſhall continue his Eſtate, and ſo it is in Nature of an Affirmance and Confirmation of the Leaſe. *M.* 20 *Eliz. in C. B. Penn* and *Mericall's* Caſe. *Owen's Rep. fol.* 63.

Copyhold by Eſcheat regranted.

Every one who hath a lawful Eſtate or Intereſt in a Manor, be it in Fee-Simple, Fee-Tail, Dower, Tenant by the Curteſie, Tenant for Life, Tenant for Years, Guardian, Tenant by Statute-Merchant, Staple or *Elegit*, Tenant at Will and Sufferance; if a Copyhold eſcheat or come into their Hands during the Time, they may regrant it, and it ſhall bind the Lord, becauſe every one of them is *Dominus pro tempore*. *Co. Lit.* 58. *Co.* 4 *Rep.* 28, 29.

If a Copyholder accept of a Leaſe for Years of his Copyhold, by this his Copyhold Eſtate is determined. 29 *Eliz. Lane's* Caſe. *Co.* 2 *Rep.* 16.

Reaſonable Fines.

If the Fine of Copyholders of a Manor upon Admittance be incertain, yet the Lord cannot demand or exact unreaſonable or exceſſive Fines; and if he do, the Copyholder may by the Law deny to pay them, and

and it is no Forfeiture; and it ſhall be determined before the Judges upon Proof of the Value of the Land, what Fine was reaſonable to be demanded; for if it ſhould be otherwiſe, great Part of the Copyhold ſhould be deſtroyed at the Will of the Lord, by exacting unreaſonable Fines. *Co.* 4 *Rep.* 27. *Latch's Rep. f.* 14. *acc.*

Reaſonable Time to pay it. If the Lord aſſeſs a reaſonable Fine, and require the Copyholder to pay it, he is not bound to pay it preſently, becauſe he could not know what the Lord would aſſeſs, *& nemo tenetur divinare*, and he ſhall therefore have reaſonable Time to pay it in, if the Lord limits no Time; but it is otherwiſe of a Fine certain. *Co.* 4 *Rep. f.* 27.

Not till Admittance. *Note*, That no Fine is due to the Lord, either upon Surrender or Deſcent, until Admittance, for that is the Cauſe of the Fine; and if after the Tenant deny to pay it (if it be a reaſonale Fine) it is a Forfeiture of the Copyhold. *Bacon* and *Flatman's* Caſe, and *Sand's* Caſe, ſo reſolved. *Vide Co.* 4 *Rep. f.* 28.

Deſerting of Services. If a Copyholder come not to do his Services, although he were often demanded to do them, but ſtill puts off from Time to Time to do them,

them, although he do not absolutely refuse, yet his Deferring is a Forfeiture. *Pasch.* 2 *Car.* 1. *in B. R. Johnson's* Case. *Latch's Rep. f.* 14.

What Fine.

The Lord of a Manor assessed Two Years and half Value of the Land, according to the racked Rent, for a Fine upon the Grant of a Copyhold, and for Non-Payment thereof entred for a Forfeiture: And it was held by the Court of King's Bench, that the Fine was unreasonable, and that one Year and an Half of improved Rent was high enough; and therefore the Lord's Entry for the Forfeiture was adjudged unlawful. *Hill.* 5 *Car.* 1. *in B. R. Dowe* and *Golding's* Case, *Cro.* 1. *Par.* 142 *L. L. ibid.*

Fine certain tendred.

The Lord assessed a Fine of twelve Pounds to be paid by a Copyholder, and appoints it to be paid at his Capital Messuage of the Manor Three Months after, and the Copyholder pretending the Fine to be certain, (that is to say, Two Years Quit-Rent,) offered the same at the Day of assessing the other Fine; but at the appointed Place for the Payment thereof, cometh not thither to excuse his Non-Payment, nor make any other Refusal; and it was held

to

to be a Forfeiture of his Copyhold: But if he had come at the Day assigned him for the Payment, and had then tendered the Two Years Quit-Rent, being the Fine certain according to Custom, though not assessed nor demanded by the Lord, it had not been a Forfeiture. 2 *Cro.* 617. *Latch's Rep.* 122.

Statute of Limitation.

It was adjudged, That Copyhold-Lands were within the Statute of 21 *Jac.* 1. *c.* 16. for Limitation of Entries within 20 Years. *Pract. Reg.* 170. But see the late Act 4 & 5 *Ann.* to commence an Action within a Year upon such Entry or Claim. But that Copyhold is not within the Statute of 12 *Car.* 2. touching Guardians. *Idem* 171. *Vide* 3 *Lev.* 395. 2 *Lutw. Ent.* 1139, 1140.

Tenants by the Verge,

Are after the same Nature as Tenants by Copy of Court-Roll; but they are so called, for that when they will surrender their Tenements into the Lord's Hands, unto the Use of another, they have a little Rod, which, by Custom of the Manor, they deliver unto the Steward or Bailiff, and he that takes the Lands, receives

ceives the Rod in Court from the Steward in the Name of *Seiſin*, and therefore they are called Tenants by the *Verge*: Yet they have no other Evidence but Copy of the Court-Roll. *Lit. Ten. Lib.* 1. *cap.* 10.

Copyholder commits wilful Waſte, and incurs a Forfeiture, the Chancery will not relieve him.

One had cut down Timber upon a Copyhold Tenement, which was preſented at a Court-Baron, and found to be Waſte, and conſequently a Forfeiture; whereupon the Defendant was admitted, brought his Ejectment, and had a Verdict. The Plaintiff brought his Bill in Equity to be relieved: And it being not prov'd that the Plaintiff had ſold any of the Timber, and that the Premiſſes was much out of Repair, an Iſſue was directed to try if the Waſte was wilful; which being found for the Plaintiff, it was decreed he ſhould be reliev'd: And that the Defendant ſhould deliver her the Poſſeſſion again, and account for the meſne Profits: But the Lord Chancellor ſaid in Caſe it had appeared wilful Waſte, ſhe ſhould not have been reliev'd. *Mary Thomas*, Widow *v. Potter & al'. Hill.* 19 *Car.* 2. *Chancery Caſes*, 1 *par. fo.* 98.

Copyholder

An Agreement before Marriage, to ſettle Copyhold on his intended Wife, decreed to ſtand good againſt a Purchaſer.

Copyholder before Marriage agreed to ſettle his Copyhold Tenement on his intended Wife; the Marriage took Effect, and the Huſband ſurrendred the ſaid Copyhold to a Stranger for a Sum of Money by way of Mortgage; he afterwards ſurrendred the Premiſſes to the Uſe of his Wife for Life, which Surrender was not preſented at the next Court: But the Widow however procur'd herſelf to be admitted; and it was decreed by the Court of Chancery, That the Wife being in, purſuant to a Marriage-Agreement, her Eſtate ſhould not be impeach'd; but had it been a meer voluntary Settlement, it would have been otherwiſe. *Merlin* v. *Secmore* in *Canc. Trin.* 22 *Car.* 2. *Chancery Caſes*, 1 *Part p.* 170.

A Copyholder having agreed for a valuable Conſideration to ſurrender his Land, is but in the Nature of a Truſtee for the Vendee. *Ibid. p.* 171.

No Fine due from a Reverſioner on his Admittance.

Where a Copyholder in Fee ſurrenders to the Uſe of another for Life, and the Leſſee dies, he ſhall not pay a Fine for a Re-admittance to the Reverſion; for it continued always

ways in him. 9. Co. *Mary Podger's* Caſe. 107.

But one Fine du from Tenant for Life, and thoſe in Remainder.

And if ſuch Copyholder in Fee ſurrenders to the Uſe of One for Life, Remainder to a Third Perſon in Fee, but one Fine is due; for the particular Eſtates and the Remainders are but one Eſtate. *Mich.* 38, & 39 *Eliz. B. R.* by *Poplar.*

Lord after Acceptance of Rent, may enter for Waſte committed before that Time.

If a Copyholder incur a Forfeiture by committing Waſte, and the Lord afterwards accept the Rent, he may enter for the Forfeiture notwithſtanding; for the Copyhold was in him immediately by the Forfeiture. *Mich.* 29. *Eliz. B. R. Godb.* 47.

Tenants in Coparcenary.

There be Two Kinds of Tenants in *Coparcenary*; that is, Parceners at the Common Law, and Parceners by Cuſtom.

After the Courſe of the Common Law, when a Man or Woman is ſeiſed in Lands or Tenements in Fee-Simple, or Fee-Tail, and hath no other Iſſue but Daughters, and dieth; the Tenements deſcend to the Daughters equally as Coheirs, and

and they ſhall enjoy every one an equal Part thereof as Tenants in Parcenary or Copartnerſhip, and are all as it were one Heir to their Anceſtor: And theſe Coheirs or *Parceners* may have a Writ, called, *Breve de partitione facienda*, to have the Lands equally divided and ſhared amongſt them.

Siſters. If a Man ſeiſed of Lands die without Iſſue, and the Tenements deſcend to his *Siſters*; or if he hath no *Siſters*, and it deſcends to his Aunts: *Aunts.* They be *Coheirs* or *Parceners* as aforeſaid.

If there be Two *Parceners*, One marries and hath Iſſue and dieth, and afterwards her Husband holdeth one *Tenant by Courteſie.* Half, as Tenant by the Courteſie; the Coheir or Parcener that ſurviveth, and the Tenant by the Courteſie may make Partition between them: And if the Tenant by the Courteſie will not conſent thereunto, the ſurviving Parcener may compel him by a Writ *de Partitione facienda.*

But if the Tenant by the Courteſie deſires to have Partition, and the Parcener ſurviving will not agree to it; the Tenant by the Courteſie can have no Remedy: For he cannot have

have a Writ *de Partitione facienda* againſt the ſurviving Parcener, although the Parcener may have it againſt him. See the late Acts concerning *Partition.*

Parceners by Cuſtom.

This Tenure is Gavelkind, and is only uſed in *Kent*, except in ſome certain Places in *England* beſides, and in *North-Wales*. But the Men of *Kent* only claim this as a Right remaining unto them unconquered; and it is thus: If a Man be ſeiſed in Fee-Simple or Fee-Tail in Lands or Tenements of the Cuſtom and Tenure of Gavelkind, and hath Iſſue divers Sons, and dieth; all the Sons ſhall be *Coheirs*, and equally inherit thoſe Lands and Tenements as Females do, and may make Partition by Writ *de Partitione facienda*, and divide, as in the Caſe of Daughters at the Common Law. *Parceners by Cuſtom. Gavelkind.*

Grant of *Borough-Engliſh* Lands to one and his Heirs for Three Lives, the Youngeſt Son ſhall be Heir. 2 *Lev.* 138.

Otherwiſe in Gavelkind, of Rent granted out of it, it ſhould go amongſt

mongſt all as the Land ſhould. *Idem* 89.

A Rent *de novo*, granted out of Gavelkind Land, ſhall deſcend according to the Deſcent of the Land. 1 *Mod. Rep.* 86, 96.

Joint-Tenants.

Joint-Tenants. When a Man being ſeiſed of certain Lands and Tenements, doth thereof enfeoff Three or Four, or more, to have and to hold to them and their Heirs, or to hold to themſelves for the Term of their Lives, or for another's Life, and they become ſeiſed by Virtue of that Feoffment: Theſe are ſaid to be Joint-Tenants.

Diſſeiſors. Likewiſe, if two or more diſſeiſe another of any Lands or Tenements to their own Uſe, the Diſſeiſors be Joint-Tenants; but if it be but to the Uſe of one of them, they be not Joint-Tenants.

Now, the Nature of Joint-Tenants is, That the whole Eſtate ſhall go to the Survivor.

As if there be Three Joint-Tenants in Fee-Simple, and the one of them hath Iſſue, and dieth, the Two that

ſurvive ſhall have the whole Tenements, and nothing thereof ſhall go to the Iſſue of him that is dead: And if the ſecond Tenant have Iſſue and die, the Third who is the Survivor ſhall enjoy the Whole, and ſhall have it in Fee-Simple to him and his Heirs. *Survivor.*

But now there is a Difference in Tenants in Parcenary: For if there be three *Copartners*, and one hath Iſſue, and dieth before there be any Partition made, that Part which belonged to her that is deceaſed, ſhall deſcend to her Iſſue: And if ſuch a Parcener die without Iſſue, her Part ſhall deſcend to her *Coheirs:* So that this they have by Deſcent, and not by Survivorſhip, as Joint-Tenants have. *Alitor, if Copartners.*

And as the Survivorſhip taketh Place among Joint-Tenants, ſo it doth amongſt all Perſons who have Joint Eſtate or Poſſeſſion with others in Chattels Real or Perſonal. *Survivorſhip.*

As, If a Leaſe be made to ſeveral Perſons for Term of Years, the Survivor of the Leſſees ſhall enjoy all the Tenements during the Term by Virtue of the Leaſe. *Upon a Leaſe.*

Of Goods, &c. And in like Manner, Goods and Chattels Perſonal, whereof there be Partners, ſhall go to the Survivor. And if a Bond be made to many Perſons for one Debt, and ſome of the Obligees die, the Survivor ſhall have all the Debt. And ſo it is in all Covenants and Contracts amongſt Partners.

There may alſo be Joint-Tenants for Term of Life, and yet they have ſeveral Inheritances: As,

Several Inheritances. If Lands be given to Two Men to hold to them for Term of their Lives, and to the Heirs of their two Bodies, here theſe *Donees* are Joint-Tenants for Term of their Lives, and have ſeveral Inheritances: For if one of them have Iſſue and die, the Survivor ſhall enjoy the Whole during his Life by Survivorſhip. And if the Survivor have alſo Iſſue and die, then the Iſſue of them both ſhall enjoy the Eſtate equally between them, as Joint-Tenants.

Now the Reaſon why theſe are ſaid to have ſeveral Inheritances, is, becauſe it is impoſſible for them to have an Heir between them, as a Man and a Woman may have.

Diſtinction. Therefore the Law maketh this Diſtinction according to Reaſon and the

the Form of the Gift; that is to the Heirs that one getteth on the Body of his Wife; and ſo likewiſe of the other: So that by this Reaſon it muſt of Neceſſity be, that they have ſeveral Inheritances.

One Donee dying.

And if after the Death of the *Donees*, the Iſſue of one of the *Donees* die alſo, leaving no Iſſue of his Body ſurviving, in this Caſe, the *Donor* or his Heirs may enter into the Moiety of the Lands, as in his Reverſion, though the other of the *Donees* hath Iſſue living.

Simile between Females.

In like Manner, If Lands be given to Two Females and to the Heirs of one of them; in this Caſe, the one of them, that is, ſhe that hath it but for Life, hath a Freehold; and the other hath a Fee-Simple: And if ſhe that hath a Fee die, the other who hath the Freehold, ſhall enjoy the Whole during her Life, by Virtue of her Survivorſhip.

And if Tenements be given to Two, and to the Heirs to be ingendred of the Body of one of them; here the one hath Freehold, and the other Fee-Tail.

One grants a Rent-Charge to the other.

If there be two Joint-Tenants, and they be ſeiſed of an Eſtate in Fee-Simple, and the one by Deed grants a Rent-

a Rent-charge to another out of that Part which appertains to him; now, during the Life of the Grantor, this Rent-charge is good and effectual, but it becomes void after the Death of the Grantor: For the Tenant that ſurviveth, ſhall hold all the Land by Survivorſhip, diſcharged from the Rent-charge of the other.

If there be two Joint-Tenants for Life, and one lets his Part for Years, rendring Rent, and dies, the Term ſhall continue againſt the Survivor, but the Rent is gone. *Finch Lib.* 1. *cap.* 3. *p.* 13. *Dyer* 187.

Difference between Coheirs and Co-partners.

But amongſt *Coheirs* or Parceners, it is otherwiſe: For if there be Two Parceners in Tenements in Fee-Simple, and before Partition one chargeth his Part by his Deed with a Rent-charge and dieth leaving no Iſſue, whereby his Moiety deſcends to the other Partner; here that Part ſhall not be freed of the Rent-charge, becauſe he cometh to this Moiety by Deſcent as Heir by Law.

Partition by Conſent.

If Joint-Tenants be deſirous to make Partition between them, they may do it by Conſent and Agreement amongſt themſelves; and ſuch Partition is good and binding againſt each other: But unleſs it be done by

by mutual Conſent amongſt themſelves, the Law cannot enforce or compel them, or either of them, to do it; becauſe Joint-Tenants cannot have a Writ *de partitione facienda*, as Tenants in Copartnerſhip may have. But ſee the late Stat. *Poſtea* 58.

If there be a Joint Eſtate of Lands and Tenements made to a Man and his Wife, and to a third Perſon; here the third Perſon ſhall have as much as the Man and his Wife; that is one Moiety: For the Man and Wife can have but Half the Eſtate, becauſe they are but one Perſon in Law. *Husband and Wife are but one.*

In like Manner it is, if Lands were made to a Man and his Wife, and to Two others; here the Man and Wife can have but a Third Part, and the Two others the other Two Parts.

Tenants in Common.

Such as have Lands and Tenements by ſeveral Titles, and not joint Title, and none of them knoweth what is ſeveral to him, whether it be in Fee-Simple, Fee-Tail, or for Term of Life; theſe are ſaid to be Tenants in Common, becauſe they *Tenants in Common.*

ought by the Law to hold, enjoy and occupy the Lands and Tenements in Common and undivided, and to take the Profits in Common, as coming to the ſame Lands and Tenements by ſeveral Titles, and not by one joint Title.

Joint-Tenants become Tenants in Common.

If a Man enfeoff two Joint-Tenants in Fee, and one of them *aliens* his Part to another in Fee; this *Alienee* and the other Joint-Tenant, be Tenants in Common, becauſe they now ſtand ſeiſed by ſeveral Titles; the one Joint-Tenant by Virtue of the firſt Feoffment made to him; and the other Joint-Tenant and the *Alienee* become ſeiſed in their Moiety by Virtue of the Feoffment of the other Joint-Tenant; ſo that the ſeveral Feoffments make their Titles ſeveral, whereby they become Tenants in Common.

Simile.

If there be three Joint-Tenants, and one of them *aliens* his Part to another Perſon in Fee, here the *Alienee* is Tenant in Common with the other two Joint-Tenants, and of the other two Parts, the two Joint-Tenants be ſeiſed jointly, and the Survivor of them ſhall have the Whole of theſe two Parts by Virtue of Survivorſhip.

If

If there be two Joint-Tenants in Fee, and one of them gives his Part to another in Tail, here the *Donee* and the other Joint-Tenant become Tenants in Common. Simile.

Alſo if Lands be given to two Men, and to the Heirs of their two Bodies; in this Caſe, thoſe *Donees* have a Joint Eſtate during their Lives; and if both of them have Iſſue and die, both their Iſſues ſhall hold the Land as Tenants in Common. Simile.

If Lands be given to two Men and their Heirs, to hold to each a Moiety, theſe are Tenants in Common.

If a Man, being ſeiſed in certain Lands, doth enfeoff another in the Half of it, without limiting of the ſame Half in Severalty at the Time of the Feoffment made; that is, do not diſtinguiſh that Half from the other by particular Bounds and Limits; in this Caſe the *Feoffor* and the *Feoffee* ſhall hold their Parts of thoſe Lands in Common. *Between Feoffor and Feoffee.*

And as it is amongſt Tenants in Common in Lands or Tenements in Fee-Simple or Fee-Tail, in the ſame Nature it alſo is between Tenants for Term of Life: As if there be two *Difference between Tenants for Life and in Common.*

Joint-Tenants ſeiſed in Fee and one of them lets to a Man his Part for Term of his Life, and the other Joint-Tenants lets to another Man his Part for Term of Life; theſe two Leſſees be Tenants in Common for the Term of their Lives.

One grants away. Likewiſe if a Man lets Lands unto two Perſons for the Term of their Lives, and the one of them grants all his Eſtate of the Part belonging unto him unto a third Perſon; then this third Perſon to whom this Grant is made, and the other Tenant for Term of Life, be both Tenants in Common during the Lives of both the Leſſees.

One releaſes. If there be three Joint-Tenants, and one of them releaſeth all his Right which he hath in the Land by his Deed to one of his Fellows, then he to whom the Releaſe is made, hath the third Part of the Lands by Virtue of that Releaſe, and ſhall hold that third Part with himſelf and his Fellow in Common, and they two ſhall hold the other two Parts jointly.

Simile *to the Husband.* Alſo if a joint Eſtate be made unto a Man and his Wife, and to a third Perſon, and that third Perſon, releaſeth his Right which he hath in

that

that Eſtate to the Husband; then the Husband hath the third Perſon's Moiety, and the Wife hath nothing therein at all.

And if ſuch third Perſon releaſe his Right in his Moiety to the Wife, not naming her Husband in the Releaſe; then the Wife hath the third Perſon's Moiety, and the Husband hath nothing at all in it, but only *Jure Uxoris*, in the Right of his Wife; becauſe the Releaſe ſhall work to inveſt the Eſtate in the Perſon to whom the Releaſe is made, of all that appertained to him that made ſuch Releaſe. *Simile to the Wife.*

There may be alſo Tenants in Common by Title of Preſcription; that is, when two have holden Lands in Common undivided; the one, one Half from his Anceſtors, and the other, the other Half from his Anceſtors, or from whom the Eſtate is derived unto them undivided, Time whereof the Memory of Man hath not known the contrary: Theſe are Tenants in Common, by Title of Preſcription. *Tenants in Common by Preſcription.*

Now theſe Tenants in Common ought in ſome Caſes to have for the Maintenance of their Poſſeſſion ſeveral Actions; and in ſome Caſes they *What Action by them, &c.*

ſhall all join in one Action: For if there be two Tenants in Common, and they be diſſeiſed, they two cannot bring againſt the Diſſeiſor one Aſſize in both their Names, but they muſt have againſt him two Aſſizes: For every of them ought to have an Aſſize of his Half, becauſe the Tenants in Common are ſeiſed by ſeveral Titles.

But amongſt Joint-Tenants it is otherwiſe; for if there be never ſo many of them, and they be diſſeiſed, they ſhall have but one Aſſize in all their Names, becauſe they have all but one joint Title.

It hath been formerly held, that an Action on the Caſe lay not for one Tenant in Common, *&c.* againſt another who diſpoſes of the Whole. 1 *Lev.* 29, *&c.*

Stat. 4 & 5 Annæ cap. 16.

But by the late Act, for Amendment of the Law, 4 & 5 *An.* it is enacted, *That Actions of Accounts may be brought and maintained againſt the Executors and Adminiſtrators of every Guardian, Bailiff or Receiver, and alſo by one Joint-Tenant, and Tenant in Common, his Executors and Adminiſtrators, againſt the other as Bailiff, for receiving more than comes to his juſt Share or Proportion, and againſt the Executor*

and Administrator of such Joint-Tenant, or Tenant in Common.

There is likewise a Difference in suing real Actions between Partners that be in divers Descents, and Tenants in Common. For if a Man who is seised of Lands in Fee, dieth, leaving only two Daughters his Coheirs, and these two Daughters enter, and have each of them a Son, and die without making any Partition between them, so that the Lands descend equally to their two Sons, the one Moiety to one of them, and the other to the other, and they enter and enjoy the same in Common, and be disseised; they shall not in this Case bring two Assizes, but one Assize in both their Names: For though they came in by divers Descents, yet they be Parceners, and a Writ *de partitione facienda* lieth between them. Nevertheless they be not Parceners by Reason of the Seisin and Possession which they have from their Mothers, but in Respect to their Estates which descended to their Mothers from their Grandfather. *Tenants by divers Descents.* *Partition.*

And so in Respect and Consideration of their first Descent that was to their Mothers, they have a Title in Par- *Parceners.*

Parcenary which maketh them Parceners; and they be but as one Heir to their Common *Anceſtor*, their Grandfather, from whom the Land deſcended to their Mothers. And therefore, before Partition made between them, they ſhould have but one Aſſize, though they came in by ſeveral Deſcents.

Perſonal Actions. And likewiſe in Perſonal Actions, in Treſpaſs, and ſuch like Caſes which concern their Tenements in Common, the Tenants in Common ought to bring ſuch Perſonal Actions jointly in all their Names; as for Breaking their Houſes, Cloſes or Paſtures; Waſting, Treading down, or otherwiſe Spoiling the Graſs; Cutting or Selling of their Woods; Spoiling their Fruit-Trees, Fiſhing in their Ponds, and ſuch like. In theſe and all ſuch Kind of Actions wherein they are jointly concerned, the Tenants in Common ſhall have one joint Action, and recover Damages jointly.

Leaſe by them. Likewiſe, If two Tenants in Common make a Leaſe of their two Tenements to another for Term of Years, reſerving unto themſelves a certain yearly Rent, if the Rent be in Arrear, they ſhall have one Action of

of Debt for the Rent againſt the Leſſee in both their Names, and not divers Actions.

If two Perſons or more have Chattels Real or Perſonal in Common and by divers Titles, if one of them die, the other who ſurvive ſhall not have his Part that is dead in thoſe Chattels by Survivorſhip, but the Executors of him that dieth ſhall hold and enjoy his Part with them that ſurvive, as the Teſtator did or ought to have done in his Life-time. *Tenants in Common by divers Titles.*

If two Perſons have an Eſtate in Common for Term of Years, and one of them puts the other out of his Poſſeſſion, and enjoys all himſelf; then he that is ſo put out of Poſſeſſion, may bring his Ejectment againſt the other for his Moiety. *Ejectment.*

But if two Perſons be poſſeſſed of Chattels Perſonal in Common by divers Titles, as of an Horſe, or an Ox, or a Cow, or the like; and one of them takes it into his own Poſſeſſion from the other; now the other hath no Remedy, but to take this from him that hath done him the Injury, again, to occupy in Common, when he hath an Opportunity; that is in plain Terms, he may come by it as well as he can. *Chattels Perſonal.*

There

Other Tenants.

There are also Tenants in Ancient Demesn.

Of whose Tenures and Privileges you may read at large in Mr. *D'Anvers*'s General Abridgment, 657, *&c. Tit.* Ancient Demesn.

There are also several other Tenants besides the aforementioned, as Tenant by *Elegit*, Tenant by Statute-Merchant, Tenant by Statute-Staple, Tenant in *Mortgage*, &c.

Some Observations as to Mortgages.

That where Lands are mortgaged thrice over, the third Mortgagee may buy in the first Incumbrance to protect his own Mortgage, and he hath both Law and Equity for him. 2 *Vent.* 338.

That he shall hold the Land against the second Mortgagee until he be satisfied both the Money he paid the first Mortgagee, and also his own which he lent upon the last Mortgage. *Ibid.*

But where only Part of the Lands are mortgaged to the first, and the Whole to the Second, and after to the Third; if the Third buys in the first Title, it shall protect only that Part that is in the first Mortgage. *Id.* 339.

That

That a Purchaſer or Mortgagee coming in upon a valuable Conſideration without Notice, and purchaſing a precedent Incumbrance, it ſhall protect his Eſtate, though he purchaſed in the Incumbrance after Notice of a ſecond Mortgage. *Ibid.*

That Mortgages are not relievable in *Chancery* after 20 Years, for the *Statute* of 21 *Jac.* 1. *c.* 16. limits the Time of Entry to that Number of Years, *&c.* *Idem* 340. *Relief.*

That upon a Mortgage in Fee the Redemption-Money ſhall be paid to the Executor, and not to the Heir. *Id.* 338, 351.

That the Court of *Chancery* cannot ſhorten the Time that is given by expreſs Covenant and Agreement of the Parties, but when that Time is paſt, then the Practice is to foreclоſe. *Id.* 365.

But *note*, The Practice of *Chancery* is now otherwiſe: For though there be an expreſs Covenant in the Mortgage-Deed, if the Money be not repaid at the Day, the Mortgagor ſhall be abſolutely forecloſed, *&c.* yet if it appear that the Money lent is not an equitable Conſideration, the Court will not only enlarge the Time for Repayment, but order

order the Mortgagee to reconvey the Eſtate on Payment of Principal, Intereſt and Coſts, within ſix, nine, or perhaps twelve Months after the Time limited in the Deed.

Alſo, though the Covenant or Agreement be, That if the Money be not repaid at the Day, then on Payment of a further Sum in certain, the Mortgage to be abſolute; or though more Money be lent to the Mortgagor after the Mortgage, or even after the Forfeiture, yet if there appear to be no Hardſhip on the Mortgagee, or that the Money ſo lent is not a ſufficient equitable Conſideration for the Eſtate, the *Chancery* will compel the Mortgagee to reconvey on Payment of Principal, Intereſt, Coſts and Damages.

Stat. 4 & 5 W. & M. c. 16.

But by *Stat.* 4 *&* 5 *W. & M. c.* 16. If a Man mortgages his Lands or Eſtate twice, and does not declare or give Notice to the ſecond Mortgagee of the former Mortgage, or within ſix Months clear it, he loſes the Equity of Redemption to the ſecond Mortgagee, and he himſelf will ſtand foreclоſed.

And *note*, the Judges at Common Law may and ought judicially to take Notice of Mortgages and Equi-

Equities of Redemption, and therein guide themſelves by Rules of Equity, rather than by the ſtrict Rules of Law; for nothing has more contributed to the exorbitant Power of *Chancery*, than their Over-fondneſs for what they call Maxims of Law.

CHAP.

CHAP. II.

Of Leaſes, Covenants and Conditions; Proviſo's and Reſervations, Surrenders and Aſſignments of Leaſes.

Leaſes and Covenants.

IN all Leaſes, as we have ſaid before in the Title of *Tenant for Term of Years*, there muſt be Leſſor and Leſſee: He which demiſes or lets Land to Farm, is the Leſſor; and he who takes the Land, that is, unto whom it is ſo let or demiſed, is called the Leſſee; in more vulgar Terms underſtood by the Title of *Landlord* and *Tenant*.

Landlord and Tenant.

Firmor or Farmer, who it is.

According to our general and common Acceptation now-adays every Leſſee for Life, Years, or at Will, though it be but of a Cottage, or never ſo ſmall a Tenement or Houſe, is called a *Firmor* or Farmer, and the Premiſſes a Firm or Farm; ſo we ſay in the Writ, *A Firma ſua ejecit*; which may be the Reaſon they are called Farms.

But anciently the chief Meſſuage in a Pariſh or Country Town was called, by Way of Pre-eminency, a Farm;

Farm; and unto this Farm belonged great *Demeſns* of all Sorts, as Gardens, Meadows, Paſtures, Rivers, Woods, Moors, Waters, Mariſhes Furzes, Heath, and alſo Meſſuages, Houſes, Toſts, Mills, and the like: And all thoſe are comprehended under the Title of Lands. Theſe *Demeſns* were uſed to be let out to others for Term of Life, Years or at Will. Of Leaſes by Parol or Word of Mouth, *&c. Vide ante pa.* 16, 17. *Demeſns.*

Theſe ancient Farms, (or Firms, which you will call them; which Appellation or Dialect differs according to the County: In *Eſſex*, *Norfolk* and *Suffolk*, they call them Ferms and Fermors; but in the Weſt, are called Farms and Farmers:) Theſe Farms, I ſay, attained to this Title from the old *Saxon* Word *Feormion*, which ſignifies to feed, provide or yield Victuals; ſo that a Farmer ſignifies a Victualler; for anciently the Landlords did not receive Money upon their Leaſes for their Rent, but Corn and Victuals, being ſuch as the Farm yielded of its Growth; until it came by Degrees into Part Money and Part Victuals; and at laſt, about the Time of King *Henry* the Firſt, the Rent reſerved *The Name and Nature is now alter'd.*

ſerved was turned into Money, and ſo hath hitherto continued amongſt moſt Men.

Ancient Rents. Yet amongſt ſome, where the ancient Rents or Reſervations are not altered, the Rent is in Corn or Victuals to this Day, eſpecially in College and Church-Leaſes; and doubtleſs, many of thoſe ancient Reſervations received their utmoſt Period in the general Diſſolution of the Religious Houſes, to the no ſmall Detriment of the induſtrious Farmer. *Co. 7. Par. f. 13.*

What Rents. All Leaſes for Years reſerving Rent, muſt be made of Lands and Tenements, whereunto the Leſſor may come to diſtrain; ſo that a Rent cannot be reſerved by a Common Perſon out of any incorporeal Inheritance, as Advowſons, Commons, Offices, Tithes, Fairs, Markets, Liberties, Franchiſes, and the like: But if a Leaſe be made by Deed in Writing of one of them, one may have an Action of Debt by way of Contract, but one cannot diſtrain: But if any Rent be reſerved in ſuch Caſes upon a Leaſe for Life, it is utterly void. *Co. 1 Par. Inſt. p. 47. Co. 7. 23.*

A Te-

A Tenant for Life leaſed for Years, the Leſſee aſſigns to him by Parol, without Deed, rendring Rent: It was ſaid by the Chief Juſtice, That although this Aſſignment by Operation of the Law turned to a Surrender, yet it was not an expreſs Surrender; and if the Rent was not good by way of Reſevation, it was good by way of Contract; and ſo Judgment was given for the Plaintiff, although all the Days were not paſs'd. 2 *Lev.* 80. *Rent by way of Contract.*

Note, that every Quarter's Rent is a ſeveral Debt, and Diſtinct Actions may be brought for each Quarter's Rent. 1 *Ventr.* 129. *Every Quarter's Rent.*

Alſo a Debt for Rent is payable by an Executor before Bonds, becauſe it ſavours of the Realty, and is maintained in regard of the Profits of the Land received. *Id.* 184. *Payable by Executor.*

Action of Debt lies for the Leſſor againſt an Aſſignee of a Moiety of the Land, for the Moiety of Rent 2 *Lev.* 231.

Leaſes for Term of Years are Chattels; ſo that if a Man have a Leaſe of Lands for five hundred Years, it is a Chattel, and goes to his Executor or Adminſtrator, if he diſ-

diſpoſe not otherwiſe of it before his Death. 32 or 23 *Lib. Aſſ. 6.*

Long Leaſes. That a Leaſe for Years, although it be a very long Leaſe, cannot be entailed; (but may be aſſign'd in Truſt to ſeveral Uſes, which may be an Entail in Effect) For the Nature of a Chattel cannot be turned into an Inheritance. *Pract. Reg.* 400. *Idem* 401.

That if a Leaſe for Years comes to be limited in Tail, the Law allows not a preſent Remainder to be limited thereupon; yet it will allow a future Eſtate ariſing upon a Contingency only; and that to wear out in a ſhort Time. By the Lord Chancellor *Finch*, in the Duke of *Norfolk*'s Caſe, *fo.* 27.

Every Man who is ſeiſed of Lands in Fee-Simple, may leaſe out his Lands for what Time or Term he pleaſeth himſelf: And ſo likewiſe might Biſhops have done formerly, before the Statutes reſtrained them. 32 *H.* 8. *c.* 28. 13 *El. c* 10. 18 *El. c.* 6.

By Tenant in Tail. A Tenant in Tail being at Age, may by Deed in Writing leaſe out ſuch Lands as have been let to Farm Twenty Years next before the Leaſe made,

made, reſerving the old Rent or more: The Words [*without Impeachment of Waſte*] muſt be omitted in it, and it muſt commence from the Day of the Making or Date. And if there be an old Leaſe in Being, it muſt be ſurrendred, expired or ended within one Year after the Making of the new one, or elſe it is void. And a Leaſe thus made, binds the Iſſue of the Tenant in Tail if he die before the Term be out: But if the Tenant in Tail die without Iſſue, the *Donor* may avoid the Leaſe by his Entry, and ſo may he in Remainder; and though he accept the Rent, yet he doth not thereby confirm the Leaſe. *Vide* 1 *Jac. c.* 3. *Hern's Con.* 62, 67, &c.

Iſſue bound.

A Man that is ſeiſed of Lands in Fee-Simple or Fee-Tail in the Right of his Wife, may make a Leaſe by Indenture in Writing of his Wife's Land, in the Name of himſelf and his Wife, and ſhe to ſeal thereunto, reſerving the Rent to himſelf and his Wife, and to the Heirs of his Wife; this Leaſe ſhall be good againſt the Woman and her Heirs after her Death.

Of his Wife's Land.

Biſhops, Deans and Chapters, obſerving the Rules, may make Leaſes

By Biſhops, &c.

ſes of ſuch Eſtates as they are ſeiſed of in Fee, in Right of their Churches: And ſo may Maſters, Provoſts, and Fellows of Colleges, and Wardens of Hoſpitals, if they be not prohibited by the private Statutes of their Foundations. *Vide* 32 *H.* 8. *cap.* 28, *&c.* as follows:

LEASES by Statute-Law.

By Tenant in Tail, &c.

I. *Stat.* 32 *H.* 8. 28. Leaſes made by Tenant in Tail, or by him who is ſeiſed in the Right of his Wife or Church (they being of full Age at the Time of ſuch Leaſe made) ſhall be good and effectual in the Law againſt the Leſſors, their Wives, Heirs and Succeſſors.

To what Leaſes it ſhall not extend.

II. The Statute ſhall not extend to any Leaſe to be made of Lands, in the Hands of any Farmer by Force of any old Leaſe, unleſs ſuch old Leaſe expired within a Year afthe the Making of the New; nor to any Grant to be made of any Reverſion of Manors, Lands, *&c.* nor to any Leaſe of ſuch Manor, Lands *&c.* which have not been let to farm, or occupied by Farmers, twenty Years before ſuch Leaſe made; not to any Leaſe to be made

without Impeachment of Waſte, nor any Leaſe to be made for above twenty-one Years, or three Lives, from the Day of the Making thereof; and that upon every ſuch Leaſe, there be reſerved ſo much yearly Rent, as hath been uſually paid for the Lands ſo let, within twenty Years next before ſuch Leaſe made; and the Reverſioners of the Manors, Lands, &c. ſo let (after the Death of ſuch Leſſor or his Heirs) may have ſuch Remedy againſt ſuch Leſſee, his Executors and Aſſigns, as ſuch Leſſor might have had againſt ſuch Leſſee.

Leaſes by Husband of the Wife's Lands.

III. Provided, That all Leaſes made by the Husband, of Manors, Lands, &c. (being the Inheritance of the Wife) ſhall be made by Indenture, in the Name of the Huſband and Wife, and ſhe to ſeal to the ſame, and the Rent ſhall be reſerved to the Husband and Wife, and the Heirs of the Wife, And here the Husband ſhall not alien or diſcharge the Rent or any Part thereof, longer than during the Coverture, unleſs it be by Fine levied by Husband and Wife.

Farms.

IV. This Act ſhall not extend to give Liberty to take more Farms or

Leaſes, than might have been taken before this Act, (*vide Stat.* 25 *H.* 8. *c.* 13. That none ſhall hold above two Farms together,) nor to any Parſon or Vicar to make any Leaſe otherwiſe than they might have done before.

Leaſes reſerved.

V. All Leaſes for Years made within three Years before the 12th of *April*, in 31 *H.* 8. by Writing indented, under Seal of any Perſon or Perſons of full Age, *ſane Memory*, not unlawfully coarcted, nor Covert Baron, of any Manors, Lands, *&c.* wherein he or they have an Eſtate of Inheritance to his or their own Uſe at the Time of the Making thereof, and whereof the Leſſee or Leſſees, or their Aſſigns, have now the Poſſeſſion by Force of ſuch Leaſe or Leaſes, and no Cauſe of Re-entry or Forfeiture thereof had or made, ſhall be good in Law againſt ſuch Leſſors, their Heirs and Succeſſors; ſo as ſo much yearly Rent be reſerved for the ſame, as was paid for the ſame within 20 Years next before the Making of ſuch Leaſe or Leaſes; or elſe ſuch Leaſe or Leaſes to be of no other Force than they were before the Making of this Act.

VI. No

VI. No Fine, Feoffment, or other Act done by the Husband only, of the Inheritance of Freehold of the Wife, ſhall make any Diſcontinuance, or prejudice the Wife, or any other who is to enjoy it after her Deceaſe; the Fines levied by the Husband and Wife only excepted. *Fine, &c. by Huſband.*

VII. This Act ſhall not give Liberty to the Wife and her Heirs to avoid any Leaſe hereafter to be made of the Wife's Inheritance, by the Husband and Wife for one and twenty Years and under, or three Lives; whereupon the accuſtomable yearly Rent for twenty Years before is reſerved, according to the Tenor of this Act. *Husband and Wife.*

VIII. This Act ſhall not extend to make good any Leaſe, made by any Eccleſiaſtical Perſon, which is made void by Authority of Parliament, or by any ſuch Perſon or other now attainted of Treaſon.

IX. *Stat.* 1 *Eliz. not printed.* (*Vide Abr.* of *Stat. Tit. Leaſes, p.* 401.) All Eſtates made by an Archbiſhop or other Biſhop, of any Manors, Lands, *&c.* Parcel of the Poſſeſſions of their Biſhoprick, or united or appertaining thereunto, to any Perſon or Perſons, Body Politick or Corporate, *Eſtates by Biſhops.*

other than to the Queen, her Heirs and Succeſſors, and other than for the Term of one and twenty Years, or three Lives from the Time of ſuch Eſtate made, and whereupon the accuſtomed yearly Rent or more ſhall be reſerved or payable yearly, during ſuch Term of one and twenty Years or three Lives, ſhall be void to all Intents and Purpoſes.

By Maſters of Colleges, Dean and Chapter, &c.

X. *Stat.* 13 *Eliz.* 10. All Leaſes, Conveyances or Eſtates, made by any Maſter or Fellow of any College, Dean and Chapter, or any Cathedral or Collegiate Church, Maſter or Guardian of any Hoſpital, Parſon, Vicar, or any other having any Spiritual or Eccleſiaſtical Living, or any Houſes, Lands, Tithes or other Hereditaments, being Parcel of their College, Cathedral, Chapter, Hoſpital, Parſonage, Vicarage, or other Spiritual Promotion, or belonging thereunto, other than for one and twenty Years or three Lives from the Making thereof, and whereupon the accuſtomed yearly Rent or more ſhall be reſerved and payable yearly during the Term, ſhall be utterly void to all Intents and Purpoſes.

XI. This Act shall not make good any Lease or other Grant against the private Statutes of any College or Collegiate Church. *Leases excepted.*

XII. This Act shall not extend to any Lease, hereafter to be made upon Surrender of a former Lease, or by Reason of any Covenant or Condition contained in any former Lease, and still continuing; so as the Lease to be made, contain not more Years than the Residue of the Years of such former Lease, nor any less Rent than is thereby reserved. *See after.*

XIII. *Stat.* 13 *Eliz.* 20. No Lease made of any Benefice or Ecclesiastical Promotion with *Cure*, or any Part thereof (and not impropriated) shall endure any longer than while the Lessor shall be ordinarily resident and serving the *Cure* of such Benefice, without Absence above 80 Days in any one Year; but that every such Lease, *so soon as it or any Part thereof shall come into any Possession or Use above forbidden*, or immediately, upon such Absence, shall cease and be void; and the Incumbent so offending shall lose a Year's Profit of his Benefice, to be distributed by the Ordinary among the Poor *Leases of Benefices, &c.* *See after.*

of the Parish. Yet see *Degge's Parson's Counsellor*, 229.

Parsons. XIV. Provided, That every Parson allowed to have two Benefices, may demise one of them (upon which he is not most ordinarily resident) to his Curate only; but such Lease shall endure no longer than during such Curate's Residence, without Absence above 40 Days in one Year.

XV. *Stat.* 14 *El.* 11. In the Statute of 13 *El.* 20. these Words [*So soon as it or any Part thereof shall come into any Possession or Use above forbidden, or*] repealed.

Parson or Curates. XVI. All Bonds, Contracts, Promises, and Covenants hereafter to be made, for suffering or permitting any Person to enjoy any Benefice or Ecclesiastical Promotion, with *Cure*; or to take the Fruits thereof, (other than such Bonds and Covenants made for Assurance of any Lease heretofore made) shall be admitted of such Validity (and no otherwise than) as Leases thereof made: The like Law is of Leases, Bonds, Promises or Covenants made by Curates.

Houses and Grounds excepted. XVII. The Branch of the Statute of 13 *El.* 10. made to avoid certain Leases, made by certain Persons

ſons having Spiritual Livings, ſhall not extend to Houſes ſituate in Corporations or Market-Towns, or the Suburbs thereof, nor unto the Grounds appertaining to ſuch Houſes, ſo as they be not the Dwelling-Houſes of ſuch Perſons, nor have above ten Acres of Ground belonging to them.

XVIII. Provided, That no Leaſe ſhall be made, by Force of this Act, in Reverſion, or without reſerving the accuſtomed yearly Rent at leaſt, or without charging the Leſſee with Reparations, or for longer Term than forty Years. Neither ſhall any ſuch Houſes be aliened, without purchaſing preſently after, other Lands in Fee-Simple, of as good Value, and as great yearly Value, as the Houſes ſo alienated. *Proviſo.*

XIX. *Stat.* 18 *El.* 6. Upon Leaſes made by Colleges in the two Univerſities, *Wincheſter* and *Eaton*, the third Part of the Rent ſhall be reſerved in Grain, to be delivered to them yearly at Days prefixed, after the Rate of 6 *s.* 8 *d.* for a Quarter of Wheat, and 5 *s.* for a Quarter of Malt, or under thoſe Prices: Or it ſhall be in the Election of the Leſſee to pay them in Kind, at the beſt *Rent upon Leaſes by Colleges.*

Rates found in thoſe ſeveral Markets reſpectively the next Market-Days before the ſaid Day prefixed for the Payment or Delivery thereof; and all Leaſes otherwiſe made, and all Bonds and Aſſurances given to the contrary, ſhall be void: Which ſaid Grain or Money ſhall be expended for the Relief of the Commons and Diet of the ſaid Colleges reſpectively without Fraud, in Pain of Deprivation of the chief Rulers of ſuch Colleges reſpectively, and of all others conſenting thereunto.

Exception. XX. This Act ſhall not extend to any Leaſe to be made by the Preſident and Scholars of St. *John's* College in *Oxford*, of the Manor of *Fifield*, to the Heir Male of Sir *Thomas White*, Knight, late Alderman of *London*, and Founder of the ſaid College.

Void Leaſes. XXI. *Stat.* 18 *El.* 6. All Leaſes made by ſuch Perſons as are mention'd in the *Stat.* of 13 *El.* 10, where another Leaſe is in Being, and not to be expired, ſurrendered, or ended within three Years next after the Making of ſuch new Leaſe, ſhall be void: And all Bonds and Covenants for renewing of any ſuch Leaſe contrary to this Act, or to the ſaid Statute

Statute of 13 *El.* 10. ſhall alſo be void. Howbeit, this Act ſhall not extend to any Leaſe or Leaſes heretofore made by any ſuch Perſon or Perſons.

Sequeſtration granted by the Ordinary.

XXII. After Complaint to the Ordinary, and Sentence given upon any Offence committed by the Incumbent againſt the *Stat.* of 13 *El.* 20. whereby he ought to loſe the Profits of his Benefice; the Ordinary, within two Months after ſuch Sentence given, and Requeſt made by the Church-Wardens or one of them, ſhall grant the Sequeſtration thereof to ſuch Inhabitant or Inhabitants there, as to him ſhall ſeem convenient; and upon Default in the Ordinary, it ſhall be lawful for every Pariſhioner there to retain his Tithes, and for the Church-Wardens to take the Profits of the Glebe, and other Rents and Duties of ſuch Benefice to be imployed to the Uſe of the Poor, until the Sequeſtration ſhall be committed by the Ordinary; and then the Church-Wardens and Pariſhioners are to account to him or to them to whom ſuch Seqeſtration ſhall be committed, and he or they ſhall imploy the ſaid Profits to ſuch Uſes, as by the ſaid Statute of

13 *El.* 20. are appointed, in Pain to forfeit the double Value of the Profits with-holden, to be recovered in the Eccleſiaſtical Court by the Poor of the Pariſh.

Judgments void. XXIII. *Stat.* 43 *El.* 9. All Judgments hereafter to be had for the Intent to have or enjoy any Leaſe contrary to the Statutes of 13 *El.* 20. 14 *El.* 11. and 18 *El.* 11. or any of them, ſhall be deemed void, in ſuch Sort as Bonds and Covenants are appointed to be void, which are made for that Purpoſe.

Leaſes confirmed. XXIV. *Stat.* 12 *Car.* 2. *cap.* 31. Leaſes and Grants by Colleges and Hoſpitals, and Elections of Heads, Maſters and Fellows, made during the late Troubles, confirmed under ſome Exceptions and Proviſoes.

Dutchy of Cornwal. XXV. *Stat.* 13 *Car.* 2. *cap.* 4. The King enabled to make Leaſes, Grants, and Copies of Offices, Lands, Tenements and Hereditaments, Parcel of the Dutchy of *Cornwal*, and a Confirmation of ſuch as be made not exceeding one and thirty Years or three Lives.

If Biſhops, Deans and Chapters, obſerve not the aforeſaid Rules in their Demiſes, yet their Leaſes ſhall be

be good againſt themſelves for their Lives. *Vide Co. Lit.* 45. *a.* 1 *Brownl.* 21. 1 *Leon.* 131.

Commencements and Determinations.

Generally a Leaſe for Years muſt be for a Time certain, and ought to expreſs the Term, and when it ſhould begin, and when it ſhould end certainly; and therefore a Leaſe for a Year, and ſo from Year to Year, is a Leaſe for two Years.

From Year to Year.

Alſo a Leaſe from Year to Year, ſo long as both Parties pleaſe; after Entry in any Year, is a Leaſe for that Year, *&c.* till Warning be given to depart. *Noy's Max.* 65.

Voidable Leaſes.

A Leaſe which is only voidable, and not abſolutely void, muſt be made void by the Leſſor's Re-entry (if he will) and putting out the Leſſee: Or elſe it may be continued or affirmed by receiving the Rent. *Pract. Reg.* laſt pub. 399.

So that where there is a Clauſe in the Leaſe, That if the Rent be behind and unpaid at ſuch a Day, *&c.* the Leaſe ſhall be void: Now if there was a Demand made at the Day, and the Rent not paid, this Leaſe is not abſolutely void until an Actual Entry; it is only voidable; and Acceptance of the Rent before any Entry made, ſhall make that which

was

was a voidable Leaſe, a good Leaſe. *Idem.*

Rent-Charge and Surrender. If a Leſſee for Years grant a Rent-charge, and after ſurrender; yet for the Benefit of the Grantee, the Term hath Continuance; although *in Rei veritate* it is determined, and the Grantor himſelf ſhall not derogate from his own Grant, to make it void at his Pleaſure. *Coke* 8 *Jac.* 144.

Simile of Advowſon. Tenant for Years of an Avowſon granteth the next Avoidance and Donation, if the ſame Church ſhould become void during the Term, *&c.* and afterwards ſurrenders his Term, yet if the next Avoidance be within the Term, the Grant is good, for the Years cannot determine but by the Effluction of Time, and the Law implies a Limitation, if the Church do become void during the Term; *Quia expreſſio eorum quæ tacite inſunt, nihil operatur.* Idem.

Covenants to build, &c. A Leſſee covenanteth for himſelf, his Executors and Adminiſtrators, with the Leſſor: that he, his Executors or Aſſigns, ſhall build a Brick-Wall upon Part of the demiſed Premiſſes, and afterwards the Leſſee makes an Aſſignment of his Leaſe to *C. D.* for his Term; in this Caſe the Aſſignee is not bound to build the Wall,

Wall, becauſe the Things were only collateral, and were not *in eſſe*, nor Part of the Demiſe, *&c. Godb. Rep.* 69, 70, *&c.* 5 *Co.* 16, 17.

But *note*, Where the Leſſee has built a Wall or Houſe on the Premiſſes, and afterwards aſſigns his Term, the Aſſignee is bound to keep ſuch Wall or Houſe in Reparation.

When a Covenant extends to a Thing in Being, Parcel of the Demiſe, then the Thing to be done by Force of the Covenant is annexed and appurtenant to the Thing demiſed, and ſhall bind the Aſſignee, although by expreſs Words in the Covenant he be not bound. *Vide* 5 *Co.* 17, 24. *Dyer* 27.

But if the Covenant extends to a Thing which had no Being at the Time of the Demiſe made, that cannot be annexed or appurtenant to a Thing which had no Being. *Ibid.*

If a Leſſee covenants to repair the Houſes demiſed to him during his Leaſe; this is Part of the Contract, and ſhall bind the Aſſignee, although by the Covenant he is not expreſly named. *Ibid.* *To repair.*

But where the Covenant concerns a Thing not in Being at the Time of the Demiſe, but to be made after; *Aſſignees not bound.*

this

this ſhall bind the Covenantor, his Executors and Adminiſtrators, but not the Aſſignee. *Ibid.*

If a Leſſee covenants for him and his Aſſigns, to build a Houſe upon the Land of the Leſſor, which is not Parcel of the Demiſe, or to pay any collateral Sum of Money to the Leſſor, or to a Stranger, this ſhall not bind the Aſſignee. *Ibid. Quære*

Land and Stock of Cattle. If a Man demiſe Lands for Years with a Stock of Cattle, or Sum of Money, rendring Rent; and the Leſſee covenants for him, his Executors, Adminiſtrators and Aſſigns, to deliver the Stock of Cattle or the Sum of Money at the End of the Term: This Covenant ſhall not charge the Aſſignee. *See after, Chapter* 10.

Aſſignee evicted. If an Aſſignee of a Leaſe be evicted, he may have a Writ of Covenant; ſo ſhall a Tenant by Statute, or by *Elegit*, or he to whom a Leaſe is ſold by Virtue of an Execution.

Eſtovers. If a Man grant to a Leſſee for Term of Years, that he ſhall have ſo many *Eſtovers* as ſhall ſerve to repair his Houſe, or that he ſhall burn in his Houſe, or the like, during the Term; that is appurtenant to the Land,

Land, and ſhall run with the ſame as a Thing appurtenant, in whoſe Hands ſoever the ſame cometh. *Co. Inſt.* 41.

The Statute extendeth only to Covenants which touch the Thing demiſed, and not to collateral Covenants. 32 *H.* 8. *c.* 24. *Vide antea.*

Actions by Aſſignees, &c.

An Aſſignee of an Aſſignee, Executors of an Aſſignee, Aſſigns of Executors or Adminiſtrators of every Aſſignee, may have an Action of Covenant, for all are compriſed within this Word [Aſſignee] and the ſame Right that was in the Teſtator or Inteſtate, deſcends to the Executors or Adminiſtrators. *Cok. l.* 5.

A Leſſor may have an Action for Rent againſt the Executor of the Leſſee, after an Aſſignment made by him. *Leon.* 127. 2 *Vent.* 209.

If an Aſſignee aſſigns over, until Notice given of the Aſſignment to the Leſſor and Tender of Arrears, he cannot by the Aſſignment diſcharge himſelf of the Rent. 1 *Lev.* 215. But that the Executor of a Leſſee may aſſign before Rent arrear without Notice. 3 *Lev.* 295.

A Leſſee for a Hundred Years being out of Poſſeſſion cannot aſſign. 1 *Lev.* 270.

Leſſor

Leſſor aſſigns his Rent upon a Leaſe for Years, and the Leſſee attorns, it is ſaid the Grantee may maintain an Action of Debt for the Rent. 1 *Lev.* 22.

Waſte relieved in Canc'.

A Leaſe is made for Life, the Remainder over for Life, the Remainder over in Fee; the firſt Leſſee maketh Waſte: And becauſe he in the Fee hath no Remedy by the Common Law, and Waſte is a Wrong prohibited, he ſhall have Relief in *Chancery*. *Crompton* 49. *b.*

Not againſt a voluntary Act.

A Woman ſole takes a Conſideration for making a Leaſe for one and twenty Years, and then marries; and ſhe and her Husband made the promiſed Leaſe; at the one and twenty Years End the Leſſee ſurrenders, and takes a new Leaſe for one and twenty Years more, the Husband dies, the Wife *ouſts* the Leſſee, who ſues in *Chancery* to have the firſt Leaſe continued for the firſt one and twenty Years, and could not have Remedy, becauſe the Surrender was voluntary, and the Court gives no Relief againſt a voluntary Act. 44 *Eliz.*

Concerning Leaſes, *&c.* by Baron and Feme, ſee *D'Anver's Gen. Abr.* Tit. *Baron and Feme*, fol. 698, 699, 700, *&c.* Alſo

Alſo where a Man ſhall be relieved in *Chancery* againſt Deeds and Leaſes, ſee *D'Anvers's* General Abridgment, Tit. *Chancery*, and Tit. *Leaſes*.

A Leaſe is made of a Houſe and Wood, wherein it is covenanted, That the Leſſee ſhould have Houſe-boot and Fire-boot; by this it is implied and meant, that he ſhould not have any of the Woods to uſe, or convert to any other Purpoſe; but that they do belong to the Leſſor: And the Leſſor ſhall have Help in *Chancery*, leaving to the Leſſee ſufficient for Houſe-boot and Fire-boot. *Houſe-boot, &c.*

Under the Name of Lands, are comprehended not only Gardens, Meadows, Paſtures, Rivers, Woods, Moors, Waters, Marſhes, Furze and Heath, but alſo Meſſuages, Houſes, Toſts, Mills, Caſtles, and ſuch like. *Co. Lit. l.* 1. *c.* 2. *ſect.* 14. but of a Houſe with the Appurtenances, no Land paſſes. *Pl. Com.* 85. 6. *Of the Word [Lands.]*

If one that leaſes at Will does any Act inconſiſtent with the Continuance of the Leaſe at Will, it ſhall determine it from ſuch Time as the Tenant at Will takes Notice of it. If the Leſſor ſays, the Leſſee ſhall hold *Determinations.*

hold it no longer, the Leſſee (as ſoon as he knows of the Words) may take Advantage of them as a Determination of the Leaſe. 1 *Ven.* 247. *Raym.* 204. *See after.*

Leaſe and Releaſe. It was reſolved, that a Leaſe for a Year, upon no other Conſideration than reſerving a Pepper-Corn, (if it be demanded) ſhall work as a Bargain and Sale, and ſo as to make the Leſſee capable of a Releaſe. 2 *Mod.* 249. 1 *Mod.* 262. 2 *Vent.* 35. 10 *Co. Sutton's* Hoſpital's Caſe; and that the Reſervation made a ſufficient Conſideration to raiſe an Uſe, as by Bargain and Sale.

Upon Lives. A Leaſe for 99 Years, if two Perſons ſo long live, without ſaying [*or either of them*], determines upon the Death of either. 2 *Vent.* 74. 5 *Co.* 9. 2 *Cro.* 378. *Dyer* 67. & 2 *Inſt.* 225.

Part for Lives, and Part for Years. Where ſeveral Lands, held Part for Life, and Part for Years, are demiſed to *A.* for Years, to hold from the Time of the Death, Surrender, Forfeiture, or Determination of the Eſtate and Term aforeſaid of the firſt Leſſees, and the Eſtate in one of theſe Parcels determines, the Term granted to *A.* ſhall commence immediately in the ſaid Parcel, altho' the

the other Eſtates are in Being. 1 *Saund.* 183.

If a Leſſee enters before his Term commences, and continues in Poſſeſſion after, he is a Diſſeiſor all the Time. 1 *Lev.* 46. *Diſſeiſor.*

Upon a Leaſe made to two for their Lives, without Impeachment of Waſte during the ſaid Leſſees Lives, it was held that this Privilege would hold to the Survivor; for 'tis reaſonable to give the Privilege as large a Conſtruction as the Intereſt. *Anderſon* 251. *Waſte.*

Note, If the Leſſor ſeal the Leaſe and not the Leſſee, yet it is good againſt the Leſſor as if both had ſealed. *Noy's Max.* 57. *Sealing Leaſe.*

And if at any Time there happen any Variance between the Indentures, it ſhall be taken as the Deed of the Leſſor is, and the other ſhall be intended only the Miſtake of the Writer, becauſe the Deed of the Leſſor is the Principal, and the other but only a Counterpart. *Ibid.* *Principal and Counterpart.*

Deeds between Parties indented or not indented, are ſuable and releaſable by the Parties, and not by Strangers, altho' they are to the Uſe of the Strangers. 3 *Lev.* 138.

To

To plead a Writing under a Man's Hand does not imply a Deed. 3 *Lev.* 234.

Leaſe Parol. If a Man demiſe any Lands or Tenements to another by Leaſe Parol, the Leſſor ought to be ſeiſed of the Lands or Tenements which he ſo lets at the Time of the Leaſe Parol made, or elſe he cannot maintain an Action for his Rent; for the Leſſee may plead that the Leſſor had nothing in the Premiſſes at the Time of the Leaſe made, and then is barred of his Action: But if the Leaſe be made by Deed indented, then the Leſſee cannot plead this Plea thereunto *Lit. Ten. l.* 1.

At Will. If a Man lets Lands to another by Leaſe, to hold the ſame at the Will of the Leſſee; the Law intends it to be at the Will of the Leſſor alſo, and he may put the Leſſee out when he pleaſes; likewiſe if it be let at the Will of the Leſſor, it is intended at the Leſſee's Will alſo, for the Leſſor cannot force him to ſtay longer than he pleaſes. *Coke* 1 *Part Inſt.* 55.

Covenants. A Covenant made between Landlord and Tenant, that the Tenant ſhall have a new Leaſe upon the Surrender up of his old Leaſe; and afterwards the Leſſor makes a Leaſe by Fine

Fine for more Years to a third Perſon; in this Caſe the Leſſor hath broke his Covenant, although the Leſſee did not ſurrender: Which by the Words of the Covenant ought to have been the firſt Act; becauſe the Leſſor, by letting the Leaſe to a Stranger, did diſable himſelf either to take the Surrender, or make the new Leaſe. *Noy's Maxims, p.* 13.

Rent to Executors.

Rent in Arrear upon a Leaſe for Years, goeth to the Executors of the Leſſor, if he die. As if *John Doe* make a Leaſe for Years to *Richard Roe*, and the Leſſee covenanteth and granteth to pay unto the Leſſor, his Heirs and Aſſigns, the Sum of twenty Pounds yearly during the Term in the Leaſe granted: In this Caſe if the Leſſor die, his Executors ſhall have the Rent in Arrear, and not his Heirs.

Where a Man covenants for himſelf and his Aſſigns to permit, *&c.* if a Breach be laid in the Aſſigns, this Covenant ſhall only relate to the Aſſigns after the Deed was made, and not before. 2 *Vent* 278.

Where Leſſee covenanted to build three Houſes upon the Premiſſes, and keep them in Repair; he built five, and let one of them fall to Decay,

Decay, and it was adjudged that the Covenant extended to that alſo. 2 *Vent.* 128. 3 *Lev.* 265.

If a Man covenants not to incloſe, Incloſer with Gaps is a Breach of the Covenant. *Lit. Rep.* 267.

Action. A later Covenant by a ſecond Indenture cannot be pleaded in Bar to the former, but the Defendant muſt bring his Action on the laſt Indenture, if he will help himſelf. 2 *Ven.* 218.

Water-Courſe. If a Man by Deed grants a Watercourſe and ſtops it, the Grantee ſhall have an Action of Covenant. 1 *Saund.* 322.

Eſtovers. If a Leaſe be made of an Houſe and *Eſtovers*, and the Leſſor deſtroy all the Trees, the Leſſee may have an Action of Covenant. *Id. Ibid.*

Pump. Alſo if a Leaſe be made of an Houſe and a Piece of Land (except the Ground on which the Pump ſtands) with the Uſe of the ſaid Pump, the Leſſee may repair the Pump, but no Action of Covenant lies againſt the Leſſor for not repairing it. *Ibid.*

When the Uſe of a Thing is granted, all is granted by which the Grantee may have and enjoy ſuch Uſe. *Id.*

Executor. Although the Breach of the Teſtator's Covenant is by the proper

Default of his Executors; yet the Judgment ought to be of the Goods of the Teſtator. *Idem* 112.

Repairs. An Action of Covenant does not lie againſt a Grantor for not repairing the Thing granted. 1 *Saund.* 322.

Action by Aſſignees, &c. An Aſſignee of a Reverſion may maintain Covenant for Repairs againſt the Leſſee, although Aſſignees are not named in the Covenant in the Leaſe. 1 *Lev.* 109. Covenant lies for a Grantee of a Reverſion againſt the Leſſee after Aſſignment of his Term. 3 *Lev.* 233.

Any Words in a Deed purporting an Agreement to pay Money, *&c.* amounts to a Covenant to do it. 1 *Lev.* 48.

Proviſo. A Proviſo to pay amounts to a Covenant to pay. *Id.* 151.

Under-Tenant. Covenant that he or his Under-Tenant ſhould not dig, *&c.* and *B.* who held of *J.* who holds of *H.* who held of *E.* did dig, *&c.* Held *B.* was Under-Tenant of *E.* 1 *Lev.* 144.

A Leſſee covenants with the Leſſor, his Executors and Adminiſtrators, to repair; this ſhall go with the Land, and the Heir may ſue upon it. 2 *Lev.* 92.

In

Expoſition. In expounding all Deeds, the Words and the Intent of the Parties ought to be obſerved, eſpecially in Covenants. *Lit. Rep.* 209. 3 *Lev.* 100.

Covenant if Rent be behind. If there be a Covenant in a Leaſe, that if the Rent be behind and unpaid for ſuch a Time (that is, by the Space of ſo many Days after the uſual Day or Time of Payment in the Leaſe appointed and reſerved) then the Leaſe to be void; in this Caſe, although the Leſſor do accept of the Rent after ſuch *Failer* made, here no ſuch Acceptance of the Rent can make the Leaſe good. *Dyer. f.* 51.

For not repairing, &c. If a Tenant take Houſes and Lands by Leaſe for Years and covenants with the Leſſor to ſupport, uphold and maintain the Houſes during this Term, and to leave the Houſes and Lands in as good Repair, Plight and Eſtate, as he found them: In this Caſe, if it ſhould happen that the Houſes be caſually burned by Fire or Lightning, or blown down by a Tempeſt, or deſtroyed by any other Accident, if the Leſſee do not repair and build them again, and leave them as good as he found them, the Leſſor may ſue his ſaid Covenant againſt him at the End of his Leaſe; but if a Tenant make Waſte in cut-

Waſte.

ting

ting of Wood or Timber contrary to the Proviſo's, Exceptions or Covenants in this Leaſe; for ſuch a Breach the Landlord may bring his Action of Covenant before the End of the Term. *Noy's Max. p.* 16. See after.

Againſt Aſſignee.

A Man takes a Leaſe for Years, and covenants and grants to and with the Leſſor, for him and his Executors, to repair the Houſes as often as Need requires: And afterwards the Leſſee aſſigns over the Leaſe to another, and the Aſſignee ſuffers the Houſes to decay for want of Repairs; in this Caſe the Leſſor may bring an Action of Covenant againſt the Aſſignee, although he be not named in the Covenant. *Hugh's Grand Abridgments,* 1 *Par. p.* 492. *c.* 19.

Hedge-boot by Aſſignment.

A Landlord lets a Leaſe, and covenants with his Tenant that he ſhall have ſufficient Hedge-Boot, to be aſſigned him by the Landlord or his Bailiff: In this Caſe the Tenant may not take Hedge-boot without Aſſignment. *Co.* 1 *par. Inſt. f.* 41.

To repair.

If a Man by Indenture take a Leaſe of a Houſe that is old, ruinous or wanteth Repairs, and covenants with the Leſſor to leave this Houſe at the End or Expiration of the Leaſe in good Repair. In this Caſe he is bound

to leave this Houſe in good Repair; but if he do not covenant to do it, the Law then will not oblige him to do it. *Perkins*, Tit. *Conditions*, 738.

How Houſes are to be now built within the Bills of Mortality, according to the late Act of Parliament, See at the later End of this Treatiſe.

Woods. If a Man by Indenture takes a Leaſe for Years of a Wood, and covenants with the Leſſor to leave his Wood in as good a Condition as it was at the Time of the Leaſe made; and during the Term the Wood is deſtroyed and blown down by violent Winds and Tempeſts: In this Caſe, the Landlord can have no Action againſt the Tenant for the not Performing of this Covenant, becauſe it is impoſſible for him to perform it; and the Law enforceth no Impoſſibilities: Otherwiſe it is if he take a Houſe, and that be blown down. *Hugh's Grand Abr. p.* 499.

Bonds for Rent. Touching Bonds for Performance of Covenants, if a Man takes a Leaſe for Years rendring Rent, and enter into Bond to the Leſſor to perform all Covenants and Agreements contained and comprized in the Leaſe; if he fail in Payment of Rent, the

Bond

Bond is forfeited; for the Payment of Rent is an Agreement. *Goldsborough p.* 16.

If a Man be bound in a Bond to repair the Houſes of the Obligee as often as Need ſhall require during a certain Time, and afterwards the Houſes want Reparation: In this Caſe, although the *Obligor* doth not know that they want Reparations, yet he is bound to take Notice of it at his Peril, for Ignorance will be no Excuſe in this Caſe, becauſe he hath bound himſelf to it. *Dr. & St. lib.* 2. *cap.* 47. *For Repairs.*

But if the Condition had been That he ſhould repair ſuch Houſes as he to whom he was bound ſhould aſſign; and after he aſſigneth certain Houſes to be repaired, but he that is bound hath no Knowledge of that Aſſignment; this Ignorance ſhall excuſe him in the Law, becauſe he hath not bound himſelf to any Reparation In certain, but ſuch as the *Obligee* will aſſign; and if he aſſign none, the *Obligor* is bound to none: And therefore, becauſe he that ſhould make the Aſſignment is privy to the Deed, he is bound to give Notice of his own Aſſignment; but if the Aſſignment had been appointed to have *To repair upon Aſſignment.*

been made to a Stranger, then the *Obligor* had been bound to have taken Notice thereof at his Peril. *See more Observations on Covenants in Leases, &c. at the End of this Treatise, Ch.* 10.

Warranty. If a Man makes a Lease for Years with Warranty, yet this is not a Warranty in the Law, but a Covenant, because the Lease is but a Chattel; and if the Lessee be ousted, he may bring his Action of Covenant against the Lessor.

Rent in Suspence. If *A.* be seised of twenty Acres of Land, and let the same to *B.* by Lease for Life or Years, and *A.* reserves to himself Five Shillings Rent payable at *Christmas*, and *B.* binds himself to *A.* in a Bond of one Hundred Pounds to pay the Rent reserved upon the Lease justly, according to the Law; if before any Day of Payment *A.* puts *B.* out of any Part of the Land, and he doth occupy the Residue for the whole Term, and will not pay any Rent, yet the Bond is not forfeited; for by putting the Tenant out of Parcel of the Land, the whole Rent is in Suspence: But if one Day of Payment be past before the *Ouster*, then the Tenant must pay the Rent, or else he forfeits his Bond.

But

But if a Stranger, who hath no Right in the Lands, do put the Leſſee for Years out of the ſame Land before any Day of Payment, and keep Poſſeſſion thereof until the Day of Payment be paſt; in this Caſe the Tenant ought to pay his Rent at the Day whereon it is appointed to be paid, or elſe he forfeits his Bond.

If three *Copartners* be ſeiſed of a Manor, and one of them without Conſent of the other two, lets a Leaſe of the whole Manor in her own Name unto *I. D.* for five Years, paying ten Pounds yearly at *Chriſtmas* unto the Leſſor and her Heirs, and *I. D.* enters into Bond in five Pounds to pay the Rent accordingly, and before any Day of Payment is come the other two *Copartners*, who agreed not to the Letting of the Leaſe, do put the Leſſee out of the whole Manor, and keep the Poſſeſſion till a Day of a Payment is come: Here the Leſſee ought to pay a third Part of the Rent reſerved to his Leſſor, or otherwiſe he forfeits his Bond; becauſe the other two *Copartners*, who ejected him out, have Right but in two Parts of the Manor. *Perkins* 828. *Copartners.*

Condition not to alien. A Man makes a Leaſe to three Perſons upon this Condition, That neither they nor any one of them ſhall alien, ſet, or let that Leaſe to any other without Licence firſt obtained from the Landlord: Now if the Landlord do give Licence to any one of them to let or alien, then the other two may alien without Licence: For the Condition being determined to one, is determined to all. *Hugh's Grand Abr.* 1 *Part, p.* 428. See after.

In the ſame Nature is a Releaſe where many Perſons commit a Treſpaſs, if he againſt whom the Treſpaſs is committed do releaſe one of the Treſpaſſers, that Releaſe is as effectual to all the reſt, as if they had been particularly named therein.

Action for Arrears. If a Landlord do enter for a Condition broken, or the Tenant ſurrender up his Leaſe, or his Term be expired; yet the Landlord may have an Action of Debt for the Arrears of Rent, if any be. *Noy's Max. p.* 72.

Not to alien. If a Man lets a Leaſe of Lands upon a ſpecial Condition; that is, that the Leſſee ſhall not alien the ſame to ſuch a Man, or ſuch a Man; then the Con-

Condition ſhall be taken according to the Words; and notwithſtanding that Condition, they may be alienated to any other, but to them to whom it is expreſly prohibited that the Lands ſhould not be aliened unto: And if the Lands in that Caſe be aliened to one that is not excepted in the Condition, then he may alien the Land to him that is firſt excepted, without Breaking of the Condition: For Conditions be taken ſtrictly in the Law, and without Equity. *Dr. & St. l.* 2. *c.* 35.

As, if a Leaſe be made to *A.* upon Condition that he ſhall not let or alien the ſame to *B.* if the Tenant alien to *C.* and he alien it to *B.* the Condition is not broken.

Leaſe executed by Livery and Seiſin.

If a Man be ſeiſed of Lands in Fee, and let the ſame by Indenture of Leaſe to a Stranger, paying five Pounds Rent *per Annum*, with a Condition, That if the Leſſee will hold over ten Years to him and his Heirs, that then he ſhall pay twenty Pounds *per Annum*, and the Indenture is executed by Livery and Seiſin to the Leſſee: In this Caſe the Leſſor ſhall have an Action of Debt for the Rent in Arrear within the ten Years; which proveth the Freehold and the

Fee are not in the Leſſee before the ten Years expired: But after the Expiration of the ten Years, if the Leſſee doth continue the Poſſeſſion of the ſame Land, and doth occupy the ſame by Virtue of the *Indenture*, then he hath Fee, and ſhall pay the twenty Pounds as the Rent-Seck. *Perkins* 710. *c.* 11.

When Freehold paſſeth.

But if a Man ſeiſed in Lands doth let the ſame Land by Leaſe for Term of Life, yielding to him a Roſe for the firſt ſix Years; and if he will hold the Land over the ſix Years, then to pay three Marks *per Annum*; here the Freehold is immediately in the Leſſee. *Co.* 1 *par. Inſt. f.* 218. *b.*

When not upon Conditions.

A Man makes a Leaſe for Years, with this Condition, That if the Leſſor do alien the Reverſion within the Term granted by the Leſſee, then the Leſſee ſhall have the Fee; and the Leſſor doth alien the Reverſion in Fee by Fine to a Stranger: In this Caſe the Leſſee ſhall not have a Fee, for the Freehold and the Fee are lawfully in the *Conuſee* before the Leſſee can take it by Condition: But if the Leſſor had granted the Lands to a Stranger by Deed only, then the Leſſee ſhould have had Fee by the Condition. *Perkins* 729, 739.

If

If a Man have a Leaſe for Years, and demiſe or grant the ſame upon Condition, and die; his Executors or Adminiſtrators ſhall enter for the Condition broken; for they are privy in Right, and repreſent the Perſon of the Dead. *Perkins* 833. *Privy in Right.*

If a Man make a Leaſe for Years upon a Condition, That the Rent ſhall be paid at *Chriſtmas*, and before that Time come, the Leſſor give a general Releaſe to the Leſſee of all Actions and Demands; this Releaſe doth not acquit the Leſſee of the Rent, but the Leſſor may ſue for it, becauſe it was neither due, nor to be paid at the Time of the Releaſe made; and it is a Thing not meerly in Action, becauſe it may be granted over. *Lit. l.* 3. *c.* 8. *Rent not acquitted by Releaſe.*

If a Landlord lets a Leaſe for Years to two Tenants to hold jointly, with a Condition, That if the Leſſees die before the End of the Term, the Leaſe ſhall be void: Now theſe Leſſees make Diviſion, and one of them aliens his Part, and dies. In this Caſe the Leſſor cannot enter upon the Part of him that died, but the Alienee ſhall enjoy his Half-part during the Life of the ſurviving Leſſee. *Dy. p.* 67. *Leaſe to Joint-Tenants.*

Deviſe a Breach of Condition.

A Leaſe made for Years upon Condition, That if the Leſſee demiſe the Premiſſes or any Part thereof, other than for a Year, to any Perſon or Perſons, then the Leſſor and his Heirs to re-enter; the Leſſee afterwards deviſes this Leaſe to his Son by his Will: This is a Breach of the Condition.

Who may take Advantage of a Condition.

If a Man of his meer Motion give Lands to *H. H.* and to his Heirs by Indenture, upon Condition, That he ſhall yearly at a certain Day pay unto *John at Style*, out of the ſame Land, a certain Rent; and if he do not pay the Rent, that then it ſhall be lawful to *John at Style* to enter; and if the Rent in this Caſe be not paid to *John at Style*, the ſaid *J. S.* may not enter into the Lands by the Law, tho' the Words of the Indenture be, That he ſhall enter; for there is an ancient Maxim in the Law, That no Man ſhall take Advantage in a Condition, but he that is Party or Privy to the Condition: And this Man is not Party nor Privy, and therefore he ſhall take no Advantage of it. *Dr. & St. l. 2. c. 20. f. 93.*

Intent.

In many Caſes the Intent of the Party is void to all Intents, if it be not grounded according to the Law.

As,

As, if a Man make a Leaſe to another for Term of Life, and after, of his meer Motion, he confirmeth his Eſtate for Term of Life to remain after his Death to another and his Heirs: In this Caſe, that Remainder is void in Law; for by the Law there can no Remainder depend upon any Eſtate, but that the ſame Eſtate beginneth at the ſame Time that the Remainder doth: And in this Caſe the Eſtate began before, and the Confirmation enlarged not his Eſtate, nor gave him any new Eſtate. But if a Leaſe be made to a Man for the Term of another Man's Life, and after the Leſſor, only of his meer Motion, confirmeth the Land to the Leſſee for Term of his own Life, the Remainder over in Fee; this is a good Remainder over in Fee. *Dr. & Stud. c.* 20. *f.* 94. *Remainders void, &c.*

No Grant can be made, but to him that is Party to the Deed, except it be by Way of Remainder; And therefore, if a Man make a Leaſe for Term of Life, and afterwards the Leſſor grant to a Stranger, that the Tenant for Term of Life ſhall have the Land to him and his Hiers; that Grant is void, if it be made only of his meer Motion without *Grants to whom. Without Recompence.*

out Recompence. *Dr. & Stud. l.* 2. *c.* 20. *p.* 94.

Intent made void. Likewiſe if a Man make a Leaſe for Term of Life, and after grants the Reverſion to one for Term of Life, the Remainder over in Fee, and the Tenant attorneth to him that hath the Eſtate for Term of Life only, intending that he ſhould have Advantage of the Grant: His Intent is void, and both ſhall take Advantage thereof, and the Attornment ſhall be taken good according to the Grant. *Ibid.* See after.

Occupancy. If a Tenant for the Term of another Man's Life dies, living the other Man, he that doth firſt enter upon the Eſtate, after his Death, ſhall be Tenant for the other Man's Life, and ſhall be liable to the Payment of the Rent reſerved. *Co.* 1 *par. Inſt. f.* 41.

In the Caſe of Occupancy (which ariſeth by Conveyance) as,

Simile. Where Lands are conveyed to *A.* for the Life of *B.* and *A.* dies without making any Eſtate or Aſſignment thereof, here whoſoever firſt entreth after the Death of *A.* getteth Property in that Land during the Life of *B.* for the Land cannot revert to him that leaſed to *A.* till *B.* die; and to the Heir of *A.* it cannot

not go, for it is not an Eſtate of Inheritance, nor deſcendible to the Heir without ſpecial Words, and as for the Executors of *A.* they cannot have it, for that it is not an Eſtate Teſtamentary.

But *Co. Lit. f.* 41. ſhews how this Occupancy may be prevented, by adding theſe Words in the Grant, *To have and to hold to A.* and his Heirs, during the Life of *B.* for then 'tis deſcendible to the Heir. *How prevented.*

How alſo it may otherwiſe be prevented by aſſigning the Leaſe for Life over to Friends, and their Heirs, in Truſt during the Life of *B.* But the Statute 29 *Car.* 2. *cap.* 3. hath provided, That the Leſſee or Grantee may deviſe ſuch Eſtate for another's Life, by his Will, in Preſence of Three or more Witneſſes. *Aliter.*

And if he deviſe it not, and his Heir become Occupant, it ſhall be chargeable in his Hands as Aſſets by Deſcent, as in Caſe of Lands by Fee-Simple. *How by Statute.*

And in caſe there be no Special Occupant, then it ſhall go to the Executors or Adminiſtrators of the Party that had the Grant, and ſhall be Aſſets. See the *Statute.*

And

Executor de ſon Tort.

And ſome have held, That an Executor *de ſon Tort* is as much within this Act to be charged as a rightful Executor: And that the Entring into the Land and Leaſing it, is enough to make him an Executor *de ſon Tort. Q. Et Vide* 5 *Co.* 33, *&c.*

Tenant grants Part of the Term.

If a Tenant hath a Leaſe for Twenty Years of Lands and Tenements, and grant the ſame Lands for Part of his Term to a Stranger, reſerving to himſelf Forty Shillings Rent; in this Caſe he may diſtrain for the Rent reſerved, or have an Action of Debt at his Pleaſure, becauſe by common Intendment he is to have the ſame Land after the Years determined, becauſe he hath granted but Parcel of the Years, ſo that the Remainder remains in him. *Perkins* 693.

If Rent be granted to a Man, he may grant it away to another before he is ſeiſed thereof. *Idem* 108.

Husbands Executors.

If a Man and his Wife be ejected of a Term in the Right of his Wife, and the Husband bring an *Ejectione Firmæ* in his own Name, and do recover, and die; in this Caſe, his Executors ſhall have it, and not the Wife, becauſe the Recovery in his

own

own Name did veſt the Term in himſelf. *Co.* 1 *par. Inſt. fol.* 46.

If a Man be poſſeſs'd of a Term of Forty Years in Right of his Wife, and make a Leaſe for twenty Years reſerving Rent, and die; here the Executors of the Husband ſhall have the Rent for that Term, but the Wife ſhall have the Remainder of the Term when the Twenty Years is out: But if he had granted the whole Term, ſhe could have had nothing. *Co. Ibid.* *Simile.*

A Releaſe made to a Tenant for Term of Years before his Entry, is void; but a Releaſe of the Rent before Entry, is good. *Id.* 1 *par. Inſt. fol.* 270. *Releaſe.*

If a Man makes a General Releaſe of all Demands, it doth not releaſe Rent due upon a Leaſe for Years 2 *Lev.* 210.

The Tenant may grant away his Intereſt to another before Entry; and although the Leſſor do die before Entry, yet the Tenant may enter into the Lands; and if the Leſſee die before he enter, his Executors or Adminiſtrators may enter and if a Leaſe be to Two, and One of them die before Entry, the other may enter by Survivorſhip; and a Leſ- *Grant before Entry.*

Leſſor cannot grant away a Reverſion by the Name of a Reverſion, before the Entry of the Tenant.

Eſtovers appurtenant. If a Man grant to a Tenant for Years, that he ſhall have ſo many *Eſtovers* as ſhall ſerve to repair his Houſe, or that he ſhall burn within his Houſe, or ſuch like, during the Term; this is appurtenant to the Land, and ſhall run with the ſame, as a Thing appurtenant, in whoſe Hands ſoever the ſame cometh. *Co.* 1 *par. Inſt. f.* 41.

Tenants in Common. If two Tenants in Common do grant a Rent of Ten Shillings, this is ſeveral, and they ſhall be charged with Twenty Shillings Rent: But if they make a Leaſe and reſerve Ten Shillings Rent, they ſhall have no more but only Ten Shillings between them. *Id.* 1 *par. Inſt. f.* 197.

Copartners. If Two *Copartners* make a Leaſe reſerving Rent, they ſhall have this Rent in common as they have the Reverſion: But if afterwards they grant the Reverſion, excepting the Rent, then they ſhall be Joint-Tenants of the Rent.

Apportionment. If a Man leaſes Lands for Years reſerving Rent, and a Stranger doth recover Part of the Land, then the Rent ſhall be apportioned, *viz.* di-

vided, and the Tenant ſhall pay, having reſpect to that which is recovered, and to that which ſtill doth remain in his Hands according to the Value, to each Party proportionably. *Dyer* 56 & 82. See after.

And for a full Underſtanding of Apportionment of Rent; See *D'Anvers's General Abridgment, fo.* 504, 505, *&c.* Tit. *Apportionment.*

If a Man make a Leaſe excepting a Cloſe and Wood, the Law giveth him a Way to come to it. *Exception.*

If a Tenant for Years do take a new Leaſe for more Years, this is a Surrender in Law of the old Leaſe. *Watt* and *Maidwell's* Caſe. *Hill.* 3 *Car. R.* 1302. B. R. *Perkins* 117. *Hutton Rep.* 104. *Surrender in Law.*

A Leſſee for Years cannot ſurrender before his Term begin, neither can he ſurrender Part of his Leaſe, but he may grant Part of it. *Noy's Max.* 74. *Vide antea.* *By a Leſſee.*

If a Tenant for Life or Years remove his Goods out of the Houſe and Land, by Reaſon of the Greatneſs of the Rent, or for ſome other Cauſe, and the Leſſor do enter into the Houſe and Lands; this is no Surrender of the Leſſee. *Idem, p.* 72.

If

Assignment. If a Tenant for Years assign over his Term and die, his Executors shall not be charged for Rent due after his Death.

And if the Executors and Administrators of a Lessee for Years do assign over their Right in the Lease, there lieth no Action of Debt against them for Rent after such an Assignment by them made: But *vide contra antea, & 2 Ven.* 209.

Assignment. If a Tenant for Years assign his Lease to another, the Landlord may charge which of them he will: But if he once accept of the Rent from the Assignee, knowing of the Assignment, he cannot afterwards bring an Action of Debt against the Lessee for Rent due after the Assignment. *Hern. Law of Conv. p.* 110.

Acceptance of Rent. For, by Acceptance of Rent by the Lessor from the Assignee, the Privity of the Contract is extinguished, and the Action of Debt against the first Lessee is gone. 1 *Saund.* 240, 241.

But after such Acceptance, the Lessor or his Assignee may maintain an Action of Covenant against the first Lessee, upon his Covenant for Payment of Rent. *Idem.* 240. *Vide* 2 *Saund.* 302.

A Les-

A Leſſor may refuſe to accept of an Aſſignee to be his Tenant at one Time, and yet may accept of him afterwards when he pleaſes. 2 *Saund.* 182. And ſo may have his Election to ſue the Leſſee or his Aſſignee for the Rent; but after Acceptance from the Aſſignee, 'tis otherwiſe, as above.

Reverſion granted away.

If a Leſſor grant away the Reverſion, after the Aſſignment of the Leſſee; in this Caſe the Grantee cannot have an Action of Debt againſt the Leſſee for the Rent, becauſe there is no Privity between them. *Popham* 55.

By Deed only.

It is noted, That a Reverſion of a Term is not aſſignable without Deed and Attornment. 3 *Lev.* 155.

Attornment diſpenſed with.

But by a late Act for Amendment of the Law, 4 & 5 *Annæ*, It is enacted, *That all Grants or Conveyances thereafter to be made, by Fine or otherwiſe, of any Manors or Rents, or of the Reverſion or Remainder of any Meſſuages or Lands, ſhall be good and effectual to all Intents and Purpoſes, without any Attornment of the Tenants of any ſuch Manors, or of the Land out of which ſuch Rent ſhall be iſſuing; or of the particular Tenants upon whoſe particular Eſtate any ſuch Reverſions or Remainders*

mainders shall or may be expectant or depending, as if their Attornment had been had and made.

Upon Notice. *Provided nevertheless, That no such Tenant shall be prejudiced or damaged by Payment of any Rent to any such Grantor or Conusor, or by Breach of any Condition for Non-Payment of Rent, before Notice shall be given to him of such Grant by the Conusee or Grantee.*

Use. If a Lease for Years be made to a Man without any Consideration, the Lessee shall be seised to his own Use. *Perkins* 537.

Lessor's intent avoided. If a Man make a Lease of Lands to another, and to his Heirs, for the Term of Twenty Years, intending that if the Lessee die within the Term, that then his Heirs should enjoy the Lands during the Term: In this Case his Intent is void; and if the Lessee die, his Executors, and not his Heirs, shall enjoy the Term; for by the Law of the Land, all Chattels shall go to the Executor, and not to the Heir. *Dr. & St. l.* 1. *c.* 24.

Appurtenances. If a Man lets a House with the Appurtenances, no Land passes thereby; but if it be with all Lands thereunto belonging, here the Lands used with-

with the Houſes do paſs. *Hern's L. of Conv. p.* 104.

Leſſor concluded.

If a Man take a Leaſe of his own Land by Indenture, he is then concluded to ſay, That the Leſſor had nothing in the Land at the Time of the making of the ſaid Leaſe; but after the Leaſe is out, the *Eſtoppel* is removed. *Terms de Ley Eſtoppel Co.* 1 *pa. Inſt. fol.* 47.

Ejectment by Joint-Tenant.

If two Perſons be Joint-Tenants of a Leaſe for Years, and one bid the other go out of the Houſe, and he goeth out; he that goeth ſo out may have an *Ejectione Firmæ* againſt the other, as well as if he had ejected him out by Force. *Beverlie's Caſe*, 24 *Car. Clayton's Rep. p.* 111.

Leaſe for 20 Years good for 10.

One who had Power to leaſe for ten Years made a Leaſe for Twenty. Decreed in Equity, that it was a good Leaſe for ten Years. *Perry v. Bowen.* 15 *Car.* 2 *Chanc. Caſes* 1ſt. p. 23.

Leſſor accepts his Rent of the Aſſignee, cannot after reſort to the Leſſee.

A Leaſe was made to one who aſſign'd it to another, *i. e.* the Leſſor receiv'd the Rent of the Aſſignee which had become due in his Time, but had no particular Notice given him of the Aſſignment: It was adjudg'd in this Caſe that no ſpecial Notice need be given the Leſſee of the Aſſignment,

ſignment, but that the Acceptance of the Rent of the Aſſignee was a ſufficient Notice, and he could not reſort to the firſt Leſſee for his Rent afterwards. *Mich.* 11 *Jac. B. R. Marſh & Brace's* Caſe. 2 *Bulſtr.* 151.

Leſſee may dig in Mines that are open only.

Where one lets his Land for Life or Years in which are Coal-Mines that are open, the Leſſee may dig them; but the Leſſee cannot make new Mines where none are open before *Shepherd's Abridg.* 1224.

Tenant paying his Rent to a Husband de facto, diſcharg'd.

The Plaintiff marry'd the Defendant *Wallis* (who was before marry'd to another Woman); *Wallis* made a Leaſe of her Land, and receiv'd the Rent of the Tenants: The former Marriage being diſcover'd, the Plaintiff brought an *Indebitatus Aſſumpſit* againſt *Wallis* for Money receiv'd to her Uſe, and had a Verdict: And the Court held that *Wallis* being viſibly her Husband the Tenant was diſcharg'd; at leaſt that the Recovery againſt *Wallis* in this Action wou'd diſcharge the Tenant. *Haſſer v. Wallis. Hill.* 6. *Annæ, B. R.*

Leſſor diſturb'd in his Paſſage to ſome Rooms excepted, Covenant lies.

Leaſe of a Houſe excepting two Rooms and a free Paſſage to them. The Leſſee aſſigns, and the Aſſignee diſturb'd the Leſſor in his Paſſage thereto; whereupon the Leſſor brought his

his Action. *Per Cur'*. The Action lies; but if the Disturbance had been in the Rooms excepted, no Action of Covenant would have lain, for they were not demised; but where the Lessee agrees to let the Lessor have any Thing out of the Demised Premisses, as a Way, Common, *&c.* In such Case Covenant lies for the Disturbance. *Cole's* Case *Hill.* 3 *W. & M. B. R. Salk.* 196.

Assignee not bound by a Covenant broke before the Assignment to him.

Lessee covenanted for him and his Assigns, to rebuild and finish the House within such a Time, and after the Time expired, the Lessee assign'd over the Premisses, the House not being built and finish'd. *Per Holt*, Ch. Justice. The Covenant will not bind the Assignee, because it was broke before the Assignment; *aliter*, if it had been broke after, and the Lessee had assign'd before the Time expired. *Gresçot v. Green. Pasch.* 12. *W.* 3. *B. R. Salkeld* 199.

What things a Lessee may remove.

Where a Lessee for Years sets up any thing for the Convenience of his Trade, such as Stalls, Coppers, *&c.* he may remove them at any Time during his Term, and they are seizable on a *Fi. Fa.* But what he does to compleat or beautifie the House, as laying of Hearths, setting up Chimney-

ney-Pieces, *&c.* he cannot remove them, neither can they be taken in Execution. *Poole*'s Caſe, *Mich.* 2. *Annæ. Salk.* 368.

CHAP. III.

Of Payment of Rent. Acceptance and Extinguiſhment thereof; Demands, Entries, Dates, Continuance, Limitations and Determinations of Leaſes.

Caution. IT ought to be a principal Care of a Tenant, above all Things, to provide his Rent at the Time of Payment, whereby he may avoid much *Slavery* and *Knavery* of cruel biting Landlords.

Legal Day of Payment. If a Tenant be to pay his Rent to his Landlord at our *Lady-Day* and *Michaelmas*, or within Fourteen or Fifteen Days after either of the ſaid Feaſts; in this Caſe he is not bound to pay his Rent until the laſt Day limited for Payment, for that is the legal Day of Payment, and the other before voluntary.

* *Fifteen Days after any of the ſaid Days.* * And if there be a Clauſe, that if the Rent be behind by the Space of Fifteen

Fifteen Days (more or leſs) after any of the ſaid Days of Payment, then the Leaſe to be void: In this Caſe, if the Time before limited be fifteen Days, then the Tenant ſhall have thirty Days after any of the ſaid Feaſts, to ſave his Leaſe: But if the Clauſe in the Leaſe be, That if the Rent be behind for the Space of Fifteen Days next after either of the ſaid *Feaſt-Days* of Payment, here the Tenant hath but fifteen Days only allowed to him: And ſo the Diverſity is to be noted in this Caſe in the Words of a Leaſe, which with a very little and ſcarce obſervable Alteration makes ſo much Advantage for the Tenant. *Co.* 10 *lib. f.* 227. *Co.* 1 *par. Inſtitutes, f.* 202. *Hern, Law Conv. p.* 23.

Note.

If a Man take a Leaſe for Years to pay his Rent at our *Lady-Day* and *Michaelmas*, or within fifteen Days after either of the ſaid Feaſts, and the Landlord die after either of the ſaid Feaſts, and before the fifteen Days be out; the Heir in this Caſe ſhall have the Rent then, for the firſt Day is but voluntary, and the legal Day of Payment is at the End of the fifteen Days: And if the Tenant before that Day pay the Rent, ſuch

Rent falls to the Heir.

Payment is voluntary, and not satisfactory; but if Payment be in the Morning, and the Landlord die at Noon, it is good to give Seisin: And though this Payment be voluntary, yet it is satisfactory against the Heir. *Hare* and *Savill*'s Case. *M.* 7 *Jac. in C. B. Brownl. Rep.* 2 *par.* 273. *Hern p.* 22, 23.

Landlord when to be sought for. If a Tenant for Years be to pay his Rent at *Michaelmas*, and to perform other Covenants; and if he be bound in any Obligation to pay his Rent precisely at the Day, he must in this Case seek out his Landlord to pay him; but if his Obligation be only to perform the Covenants in the Lease, he may then tender his Rent upon the Land, (if no other Place be by Agreement appointed for the Payment thereof) and it is sufficient; for the Payment is of the Nature of the Rent reserved. *Manly* and *Jenning*'s Case. *Pasch.* 10 *Jac. in C. B. Brownl. Rep.* 2 *par. p.* 276. *Noy*'s *Max. p.* 80.

Acquittance. *Note*, A Man is not bound to pay an Annuity without an Acquittance; but a Rent-Service or Rent-Charge he is: And therefore in an Action of Debt brought against a Man for Rent due upon an Indenture of Demise

miſe of Lands, he may plead Payment without an Acquittance. *Perk. Sect.* 780. *Pract. Reg.* 495.

Alſo, if he that hath Rent-Service or Rent-Charge accepts the Rent due at the laſt Day, and gives an Acquittance for it, all the Arrearages of Rent due before are hereby diſcharged. *Co. Lit.* 373. *a. Hern's Con.* 40. 3 *Co.* 66. *Diſcharge by Acquittance.*

Payment of Money before the Day appointed is in Law Payment at the Day. *Pract. Reg.* 495.

See the late Act for Amendment of the Laws, concerning Payment of Money into Court.

When one is to pay Rent at a certain Day, he hath all that Day till Night to pay it: But if it be a great Sum, he muſt then have it in Readineſs ſo long before Sun-ſet, as they that are to receive it may ſee to tell it, for they are not bound to tell it by Candle-light. See after. *Payment before Sun-ſet.*

If a *Parſon* lets his Glebe-lands to a Lay-man, the Tenant ſhall pay the Parſon Tithe of that Land beſides the Rent: For the Tithes are of Common Right. *Glebe-Lands.*

If a Man let out by Leaſe a Stock of Cattle or other Goods, (as it is very uſual now-a-days, to leaſe out *Stock let out.*

Silk Stocking-Frames to the *Weavers*, and the Rent be to be paid at ſeveral Days; if the Rent in this Caſe be in Arrear, the Leſſor cannot bring an Action againſt the Tenant or Occupier thereof until all the Days be expired: In like Manner as it is in an Obligation with Condition for ſeveral Payments; becauſe theſe are Perſonal Contracts. But it is otherwiſe in Caſe of a Leaſe for Years, which is a real Contract; for there the Landlord may have an Action of Debt againſt the Tenant after every Day of Payment, if Default be made, or he may diſtrain at his Election. *Co.* 1 *Inſt. f.* 47, & 292.

Rent to Joint-Tenants. If there be two Joint-Tenants, and they make a Leaſe for Years by Parol or Deed-Poll, and reſerve Rent to one of them, this ſhall enure to them both: But if it be by Deed indented, it ſhall enure to him alone by Way of Concluſion. *Co.* 1 *par. Inſt. f.* 47. *Co.* 8 *l. f.* 70, 71.

Dower. If an Heir let a Leaſe to a Tenant for Life, and reſerves a Rent; againſt whom the Mother of the Heir recovers her Dower, and dieth; the Tenant ſhall have the Land again for his Life, and the Rent is revived. *Coke on Lit. f.* 42.

If the Succeſſor of a Parſon or Vicar accept the Rent of a Leaſe for Years made by his Predeceſſors; yet this Acceptance is worth nothing, for the Leaſe is void by Death; but of a Leaſe for Life it is otherwiſe. *Pennant's* Caſe, *l.* 3. *f.* 65, 66. *Parſon.*

But, if a Biſhop accept the Rent upon a Leaſe for Years, he ſhall never avoid it; for it was but voidable only, and his Acceptance hath now confirmed it. *Biſhop.*

If a Man hath Lands in the Right of his Wife, and he and his Wife let theſe Lands for Years reſerving a Rent, and afterwards the Huſband dies, and ſhe before any Day of Payment takes another Husband, who accepts the Rent and dies: By this Acceptance the Leaſe is affirmed. *Acceptance by Huſband.*

In like Manner, if a Man and his Wife let the Lands of his Wife for Years rendring Rent, and the Huſband dies; if the Wife accept the Rent, it is a good Leaſe. *Terms of the Law, Acceptance.* Simile *by Wife.*

But if a Tenant for Life leaſe Lands for Years and dies, the Leaſe is void; and the Rent which is reſerved upon the Leaſe is determined. And although he in Remainder do accept *Tenant for Life.*

the Rent, yet his Acceptance will not make it good: For when it is once void by Death, no Acceptance after will make it good.

Tenant by Dower. So likewise if a Tenant in Dower leaſe for Years and die, the Leaſe is void, and Acceptance of the Rent by the Heir will not make it good again.

Confirmation. A Leaſe for Years may be confirmed for a Time, or upon Condition, or for a Piece of the Land: But if it be a Frank-Tenement, it ſhall enure to the Whole abſolutely. *Noy's Max. p.* 78.

Affirmance. Obſerve this Difference between a Leaſe for Life and a Leaſe for Years: In Caſe of a Leaſe for Life, though the Concluſion of the Condition be, That it will be void, yet Acceptance of the Rent due after the Breach doth affirm it, and make it good again. *Pennant's* Caſe, 38 *El. Co.* 3 *l.*

Parſon's Leaſe. If a Parſon let a Leaſe for Years of his Glebe-land, if it be confirmed by Patron and Ordinary, it ſhall bind the Succeſſor, or elſe not. *Coke Inſt. f.* 300.

Remainder. If a Leaſe be made to a Man for the Term of another Man's Life, and afterward the Leſſor only of his

his meer Motion confirmeth the Land to his Leſſee for Term of his own Life, the Remainder over in Fee: This is a good Remainder in the Law. *Dr. & St. l.* 2. *c.* 20. *f.* 93.

If a Man lets Lands for Life or Years, reſerving Rent, and do enter into any Part thereof and take the Profit, the whole Rent is thereby extinguiſhed, and ſhall be ſuſpended during his Holding thereof. *Leonard's Rep.* 110. *Goddard's* Caſe. *Mich.* 34 *El. C. B. Owen's Rep. f.* 10. *Hern, L. Conv. p.* 118. *Rent extinguiſhed, &c.*

In what Caſe there ſhall be a Revivor of Rent, and in what not. *Vide Lit. Rep.* 58. *Revived.*

In what Caſe there ſhall be a Suſpenſion of Rent. *Ibid.* *Suſpended.*

Where there ſhall be no Apportionment of Rent, *Id.* 61. And how the Word *Annuatim* or yearly ſhall be taken. *Apportioned.*

Note, That where two Cloſes are in the ſame Poſſeſſion, the Duty of Fencing is extinguiſhed, and ſhall not revive, though the Cloſes come after into ſeveral Hands. 1 *Vent* 97. *Dyer* 295. *Poph.* 172. 1 *Cro. Baber & Bereman's* Caſe. *Extinguiſhment.*

By Releaſe, &c. If a Leſſee aſſigns over his Term, reſerving Rent, it will be extinguiſhed by releaſing all Demands. 1 *Vent.* 314. 1 *Mod.* 99.

But it was ſaid, That a Rent incident to a Reverſion would not be barred by ſuch Releaſe. 1 *Vent.* 314. 1 *Sid.* 141.

Alſo it's ſaid, That a Man cannot releaſe a Debt by his Will. 1 *Vent.* 39.

Note, That where a Fine is levied to a Leſſee for Years, with an Intent that he ſhould ſuffer a Recovery, his Term is not drowned. 1 *Vent.* 195.

But if Tenant for Life, with Power to make a Jointure, ſuffers a Recovery, the Power is extinguiſhed. *Id.* 226.

Demand and Tender of Rent. If the Tenant come to the Landlord at any Place upon the Ground at the Day of Payment, and tender his Rent to the Landlord, it is good enough, and ſhall ſave the Condition; and the Landlord is bound to receive it, altho' it were not at the moſt *notorious* Place, nor laſt Inſtant of the Day; for he may tender his Rent at any Time of the Day, although the laſt Inſtant be the legal Time of Payment. *Co.* 1 *par. Inſt. f.* 202.

But

But obſerve by the Way, That a Tender of Rent muſt be of the whole Rent, without Deduction of Taxes or Aſſignments, or any other Charges; for Stoppage is no Payment in the Law. *Tr.* 23 *Car. in B. R. Pract. Reg. p.* 622. *Tender.*

If a Man lets Lands by Leaſe for Years to another, reſerving Rent of the Land to be paid at *Michaelmas* and our *Lady-day*, or within fifteen Days after, and for Default of Payment to re-enter; in this Caſe it is ſufficient and lawful for the Tenant to tender his Rent the laſt Hour of the laſt Day, if the Money can be told in that Time before it be dark; and ſo it is ſufficient for the Landlord to demand it the ſame Hour. *Co.* 1 *par. Inſt. f.* 202. *Tender, when.*

Altho' the Time of Sun-ſetting is the Time appointed by the Law to demand Rent, to take Advantage of a Condition of Re-entry, and of tendring Rent to ſave a Re-entry, and of tendring Rent to ſave a Forfeiture; yet it is not due until Mid-night: For a Man demands till Sun-ſet, yet if after Sun-ſet, and before Midnight, he dies, his Heirs ſhall have the Rent, and not the Executors. Which proves the Rent is not due until the laſt Mi- *Time to demand Rent.*

nute of the Natural Day. *Vide* 1 *Saund.* 287.

Reservation of Rent, how. A Man seised in Fee ought to reserve the Rent upon a Lease to himself and his Heirs; for that it appears, if a Man seised in Fee makes a Lease for Years, reserving Rent to himself and his Assigns, this Rent is extinct after the Lessor's Death, because it was not reserved to the Lessor and his Heirs.

Lease by a Tenant in Fee, and Rent reserved to the Lessor, his Executors, Administrators and Assigns; the Words Executors and Administrators are void. 1 *Vent.* 162.

So if a Man seised in Fee lease one Acre of Land, reserving 10 *s.* Rent to him and his Heirs: And also lease another Acre reserving other 10 *s.* Rent to himself, without saying [and to his Heirs] the Heir shall not have the last Rent, but it is extinct by the Death of the Lessor. 2 *Saund.* 268, 269.

Rent transferr'd. But if one seised in Fee reserves a Rent upon a Lease for Years *durante Termino* to the Lessor, his Executors, Administrators and Assigns, and not to his Heirs; yet by a Grant of the Reversion from the Lessor, the Rent is well transferred to the

Aſſignee; and in ſuch Caſe the Rent being transferred to the Aſſignee, the Law transfers alſo to him the Covenant of the Leſſee for the Payment of it as incident to the Rent. 2 *Saund.* 369.

Vide the Caſe of *Sacheverel verſus Frogat.* 2 *Lev.* 13. where the Rent was reſerved to him, his Executors and aſſigns, the Heir brought an Action, and upon a Demurrer it was argued for the Defendant, That the Rent determined by the Death of the Leſſor: But the Chief Juſtice ſaid, That the Rent being reſerved to him, his Executors and Aſſigns, would continue and go to the Heir, for the apparent Intent that it ſhould endure after his Death, otherwiſe it could not go to the Executors, and that without the *durante Termino*. But that 'tis otherwiſe where the Rent is reſerved to him, or to him or his Aſſigns; and after ſeveral Arguments, Judgment was given for the Plaintiff. *According to apparent Intent.*

Now if a Man makes a Leaſe for Years reſerving Rent generally, and does not ſay to whom, the Law will make Conſtruction, that it ſhall be paid during the Time, to them who have the Reverſion, and to whom from *When not ſaid to whom.*

from Time to Time it ſhall appertain. 2 *Saund.* 369.

Heir not named.

Where a Father is ſeiſed in Fee, if he and his Son and Heir apparent by Indenture make a Leaſe for Years, to commence upon the Death of the Father, rendring Rent to the Son by Name, although the Son be Heir to his Father, he cannot have this Rent as Heir, becauſe the Rent was not reſerved to the Heir; and he cannot have it by the Reſervation of the Leaſe, becauſe he was a Stranger to the Land, and had nothing in it at the Time of the Leaſe made. 2 *Saund.* 370.

Reſervation how conſtrued.

If a Leſſor ſeiſed of a Reverſion in Fee, demiſe the Reverſion expectant upon an Eſtate for Years to a Stranger for Life, reſerving Rent when the Reverſion ſhall happen: In ſuch Caſe he ſhall have no Rent during the Continuance of the Term for Years; for a Reſervation of Rent ſhall be conſtrued moſt ſtrongly againſt the Leſſor himſelf. 2 *Saund.* 168, 169.

Re-entry of Landlord.

If a Leaſe be made with this Proviſo, that in Caſe of Non-payment, the Landlord to re-enter: Here if the Landlord diſtrain, he may not re-enter, but he may accept of the Rent,

Rent, and yet re-enter; but if he do receive the next Rent again, then he cannot re-enter, for that eſtabliſheth the Leaſe. Entry into an Acre of Land in the Name of the whole, is a good Entry, if the Land do all lie in one County. 1 *par. Inſt. p.* 211.

Re-entry.

In a Leaſe for Years, if the Leſſee covenant, That if he or his Executors or Aſſigns do alien, that then the Leſſor ſhall re-enter, and afterwards he makes his Wife Executrix, and dies; and the Widow marries again, and her ſecond Husband aliens: In this Caſe the Leſſor may re-enter; becauſe the ſecond Husband is Aſſignee in the Law.

By Heir.

If a Man make a Leaſe for Term of Years, yielding to him and to his Heirs a certain Rent, upon Condition, That if the Rent be behind and unpaid by the Space of forty Days after any of the Days of Payment, that then it ſhall be lawful to the Leſſor and his Heirs to re-enter: And after the Rent is behind forty Days, and is demanded by the Leſſor, and is not paid, the Leſſor dieth, and his Heirs enter; in this Caſe his Entry is lawful: But if the Leſſor had died after the Feaſt-day, and before the fortieth Day, ſo that he had not demand-

demanded the Rent, and his Heir had demanded the Rent at the fortieth Day, and for Non-payment he re-enters: In this Case his Re-entry is not lawful. *Dr. & St. l.* 1. *c.* 20. *f.* 35.

Limitation to Wife. If a Lease be made to *H.* for one and forty Years, if he live so long; and if he die within the aforesaid Term, that then the Wife of the aforesaid *H.* shall have it for the Residue of the said Years: This Limitation is void; for if *H.* die, the Term ends, and his Wife shall have nothing in it. *Dyer* 254.

More Acres pass. If a Man lets all his Meadow in *D.* containing ten Acres; if there be twenty Acres of it, all passes in this Case. *Dyer f.* 80.

Feoffment by Leasee. If Lessee for Years make a Feoffment the Lessor being upon the Land when Livery was made; this is a good Feoffment, the Law adjudging the Lessee in Possession, and Livery ought always to be given of the Possession, and therefore he that hath the Possession must make the Livery. *Livery.* But if the Lessor makes the Livery himself, the Lessee being upon the Land, this Livery is void, because the Lessor cannot give

give Poſſeſſion when the Leſſee is there. *Cro. Eliz.* 321, 322.

It's ſaid, one may give Authority by Parol (or Word of Mouth) unto another to take Livery or Seiſin of Lands for him, and that if ſuch Livery and Seiſin be taken accordingly, it is good. *Pract. Reg.* 398. *Livery and Seiſin.*

If a Deed of Feoffment be made of Land, *Habendum a die datus*, and the next Day after the Date of the Deed, the Feoffee give Livery and Seiſin of his Land, this is a good Livery and Seiſin; but that if this Livery and Seiſin were made by Attorney, it is ſaid it will operate nothing. *Vide Hob.* 314. *Pract. Reg.* 398. A die Dat. &c.

A Thing that is to take Effect *a die dat'*, is not to take Effect until the next Day after the Deed bears Date; but where it is *Habendum a Dat'*, or *a Confectione Indenturæ*, there it commenceth preſently. *Pract. Reg.* 398. See after.

A. makes a Leaſe to *B.* for Life, *Habendum a Die Confectionis*, and Livery is made by *A.* himſelf a Month after, it was held that the Livery was good, it being made by the Feoffor himſelf. But if it had been by Letter

Letter of Attorney, such future Livery would operate nothing. *Cro. Jac.* 458.

Livery void. If a Man make a Lease for Years, and afterwards make a Deed of Feoffment, and delivers Seisin; if the Lessee be upon Part of the Premisses, and neither know nor assent to it, yet the Livery is void: For though the Lessor hath the Freehold and Inheritance in him, yet the Possession is in the Lessee; but if the Lessee be absent, and hath neither Wife, Children nor Servants (though he hath Cattle) upon the Ground, the Livery shall be good. 1 *par. Inst. f.* 48.

Commencement of Leases. If a Lease be made to hold from the Day of the making, or from the Day of the Date, or from the Date, the Lease shall begin the Day after it is delivered.

A Lease beginning from henceforth, shall be accounted from the Day of the Delivery, and from the making shall be taken inclusive from the Day of the making. The Day of the Delivery must be taken inclusive, and is the first Day of the Term. If from the Day of the Date, or Day of the making, then the Day of the Delivery shall be exclusive; *aliter* if from

from the Date, and it is delivered the ſame Day. 14 *Eliz. Dyer* 307.

Habendum.

If the *Habendum* of a Leaſe be for a Term of one and twenty Years, without mentioning when it ſhall begin, it ſhall then begin from the Delivery. So if an Indenture of Leaſe bear Date upon Days impoſſible, as *Febr.* 30. or *March* 40. there being no ſuch Days in our Accompt; in this Caſe, if the Term be limited to begin from the Date, it ſhall take Effect and Beginning from the Delivery, as if there had been no Date at all. *Co.* 1 *par. Inſt. f.* 6. *Co. Lit.* 46. *Hern, L. Con.* 15, 131.

Impoſſible Date.

Preſent Commencement.

Vide 1 *Vent. Rep.* 137. That a Leaſe without any Date ſpecified, or an impoſſible Date, as from 40 *Septemb.* ſhall commence preſently.

So a Leaſe made to begin from the End of the Leaſe miſrecited, ſhall commence preſently. 1 *Ven.* 83. 1 *Lev. Rep.* 234.

A Prebendary made a Leaſe for Life to hold from the Date, and Livery made the ſame Day; it was objected, that it ought to commence from the Day of the Date, and ſo Livery given the ſame Day was void: But the Court at length held it good, and

and gave Judgment for the Defendant.

Upon Failure of Iſſue. A Leaſe is made to commence after the Death of *J. S.* his Son without Iſſue; *J. S.* hath Iſſue and dies, and then the Iſſue dies without Iſſue, the Leaſe commences; for Iſſue being a Word collective, whenever the Iſſue fails the Term commences.

One Leaſe to Day, another next Day. If Lands deſcend to an Heir, he may make a Leaſe thereof before his Entry into the ſame. If a Man makes a Leaſe to Day to one for ten Years, and to Morrow makes another Leaſe of the ſame Lands to another Perſon for twenty Years; this ſecond Leaſe ſhall be good after the firſt is expired, for ſo many Years as remaineth therein to come. *Noy's Max. p.* 67.

Upon Surrender, &c. If a Man makes a Leaſe to another for one and twenty Years, and after another Leaſe to commence from the End and Expiration of the ſaid Term of Years, and after the firſt Leaſe is ſurrendred; in this Caſe the ſecond Leaſe ſhall commence preſently upon the Surrender. *Co.* 1 *par. Inſt. f.* 45.

But if it had been made to commence from the End of the ſaid one and twenty Years, there, tho' there had

had been a Surrender, yet it ſhould not have commenced till the Term had been out; ſo that by this you may obſerve, the Law puts a Diſtinction between a Term of Years and a Time of Years.

Difference.

And by three *Lev.* 284. an Eſtate veſts immediately after a Surrender made, before Acceptance or Agreement; but that it deveſts by Refuſal afterwards.

And ſo by 2 *Vent.* 199. noted, that it was ſaid, that no Surrender of an Eſtate can be perfect without Acceptance by the Surrendree. *Thompſon* verſus *Leach.*

Preſent Deveſtment.

But that Judgment was afterwards reverſed in Parliament; ſo that it appears that a Surrender deveſteth the Eſtate immediately before expreſs Aſſent of the Surrendree. *Id.* 203.

Preſent Commencement.

A Leaſe made to commence after the End of another, and there is none, it ſhall commence preſently.

Incertainty.

If a Man lets Land to another, to hold till the Leſſee hath levied Twenty Pounds; this is a good Leaſe, notwithſtanding the Incertainty.

Commencement and Determination.

Bracton ſaith, That every Leaſe muſt have a certain Beginning and Ending; *Quia id certum eſt quod certum*

tum reddi proteſt. Yet you ſee by the Caſe before, this Rule is contradicted, ſo that it holds not always, although in the Generality it doth.

Upon Nomination. For if a Man make a Leaſe to another for ſo many Years as *J. S.* ſhall name, although this be incertain at the Beginning, yet when *J. S.* hath named the Years, it is then good for ſo many Years as he names.

Upon Payment. So likewiſe, if *A.* be ſeiſed of Lands in Fee, and do grant to *B.* that when he pays him Twenty Shillings, that then from that Time he ſhall have and occupy the Land for One and Twenty Years; and after *B.* pays unto *A.* the Twenty Shillings; this is a good Leaſe for One and Twenty Years from that Time. *Co. 6. l. fo.* 34, 35. *Co.* 1 *par. Inſt. fo.* 45.

Of Glebe. If a Parſon make a Leaſe of his Glebe for ſo many Years as he ſhall be Parſon there, this is void, becauſe of the Uncertainty thereof; for the Parſon's Time there terminates with his Life, than which nothing is more uncertain.

Death. If a Leaſe be made for One hundred Years, if *A.* and *B.* live ſo long; in

in this Caſe, if either of them die, the Leaſe is ended.

If an Infant, who is ſeiſed of Lands in Soccage, make a Leaſe at his Age of Fifteen Years; this is good, and ſhall bind him. *Co.* 1 *par. Inſt. fo.* 45. *Infant.*

If a Tenant in Fee marry a Wife, and make a Leaſe of his Lands for Years, and after die, and the Wife is thereof endowed; here ſhe ſhall avoid the Leaſe, but after her Death it ſhall be in Force again againſt the Heir. *Co.* 1 *par. Inſt. fo.* 46. *Avoided by Wife.*

If a Man have a Term of Years in the Right of his Wife; if ſhe die, it remains to him; but if ſhe ſurvive him, it remains to her, and not to his Executors, without he diſpoſe of it in his Life-time. *Co. l.* 8. *fo.* 49.

If a Man licence another to enter and occupy his Land, this is a good Leaſe for Years in Law. *Brownl.* 2 *part. p.* 250. *Licence.*

A Leaſe for Years, although it be never ſo long, cannot be entailed, becauſe it is a Chattel which cannot be turned into an Inheritance. *Style Pract. Regiſt. p.* 197 *Long Leaſe*

If

For Life. If a Man ſeiſed in Fee-ſimple let a Leaſe to another, to have and to hold the ſame Lands for Term of Life, and do not mention whoſe Life, it ſhall be taken for the Leſſee's Life; becauſe the Act of every one ſhall be taken moſt ſtrongly againſt himſelf.

But if a Tenant in Tail let ſuch a Leaſe without expreſſing whoſe Life, it ſhall be taken for the Life of the Leſſor.

By Joint-Tenant. If a Joint-Tenant make a Leaſe for Years of his Part, though the Leſſee never had Poſſeſſion, or tho' it be to begin at a Day to come, and the Joint-Tenant that made it die before the Day, yet the Survivor ſhall be bound by the Leaſe, for the Leſſee hath a preſent Intereſt. *Co.* 1 *par. Inſt. fol.* 185.

Partition. If two take a Leaſe for their Lives, and make Partition, either of them dying, his Part immediately reverts to the Leſſor.

Joint-Tenants. If there be two Joint-Tenants for Life, and one of them makes a Leaſe for Eighty Years, to begin after his Death, and after dies, this Leaſe is good againſt the Survivor *Goldſ. Rep.* 187.

If

If a Leaſe be made to the Husband and the Wife, yielding a greater Rent than the Land is worth, if the Husband die, the Wife, after the Husband's Death, may refuſe the Leaſe, to ſave her from the Payment of the Rent: But if the Husband over-live the Wife, and then make his Executors, and dies; if they have Aſſets, that is, if they have Goods ſufficient of their Teſtator to pay the Rent, they cannot refuſe it: But if they have no Goods ſufficient of their Teſtator to pay the Rent to the End of the Term, if they relinquiſh the Occupation, they may by ſpecial Pleading diſcharge themſelves of the Rent and the Leaſe. *Dr. & St. l. 2. c. 33.* *How a great Rent may be avoided.*

If a Man makes a Leaſe for Years, and afterwards the Leſſor enters upon the Land let before the Term is expired or determined, and doth make a Leaſe of theſe Lands to another; this ſecond Leaſe, it's ſaid, is a good Leaſe until the firſt Leſſee doth re-enter, and then the firſt Leaſe is revived, and the firſt Leſſee is again in Poſſeſſion by Virtue of the firſt Leaſe. *Pract. Reg.* 403. *Leaſe revived.*

Where

Preſent Poſſeſſion. Where a Leaſe for Years is made by the Words, Demiſe, Grant, and to Farm let, the Leſſee is not in Poſſeſſion ſo as to bring Treſpaſs, *&c.* until an actual Entry. But where the Words, Bargain and Sell, (for a Conſideration of Money) are in, although but for a Shilling, the Party is in Poſſeſſion preſently upon executing the Deed ſo as to bring Treſpaſs, *&c. Ibid.*

Mines, &c. reſerved. If I let Lands in which are Mines, or Trees, I cannot enter to take the Trees or Mines, but am a Treſpaſſer, unleſs I do reſerve ſuch a Privilege to my ſelf when I let the Lands.

But if a Leſſor do come upon the Ground leaſed, he is no Treſpaſſer, for it ſhall be intended that he came to ſee if Waſte were done.

Mines. It is noted, That if a Man opens a Mine in his own Land, he may dig and follow the Vein under another Man's Ground; but if the Owner dig there alſo, he may ſtop his further Progreſs. 2 *Vent.* 342.

Concerning Leaſes and Grants made of the Dutchy of *Cornwal. Vide Stat. 6 Annæ, cap.* 25.

Leaſe loſt. If a Tenant for Years happen by any Caſualty to loſe his Leaſe, yet he ſhall

ſhall not loſe his Term in the Lands let by ſuch Leaſe which is loſt, if it can be proved that there was ſuch a Term let to him by Indenture, and that it is not determined.

Cancelling Indenture.

Where by an Order confirmed by Act of Parliament, That an Indenture ſhall be vacated and cancelled, 'tis not intended that the Indenture ſhall be void *ipſo Facto*, but that it ſhall be made void by Chancelling of it, and until the Cancelling the Eſtate granted by the Indenture continues. 1 *Saund.* 201.

An inſenſible Clauſe does not make the Reſidue of a Deed vitious, which is ſenſible of it ſelf. 1 *Saund. Rep.* 320.

Dureſs.

All Feoffments, Gifts, Grants and Leaſes made by Dureſs of Impriſonment are voidable, and that not only by the Parties themſelves, but by their Heirs and thoſe who have their Eſtates. *Perk. Sect.* 16. *Co.* on *Lit. f.* 253. b.

Reading the Deed.

If a Lay-Man who is unlearned, and cannot read, be bound to ſeal a Leaſe, Bond, or other Writing to another; in this Caſe he need not do it, without there be ſome there to read them to him, if he requeſt it, and in ſuch Language as he under-

ſtands: And if it be read amiſs to him, or declared contrary to what it is, ſo as the illiterate Man is thereby deceived; as a Bond of twenty Pounds is read as of twenty Shillings; or a Feoffment of two Acres is read as of one; in ſuch Caſe he may very well plead, that it is not his Deed; but if he requeſt not to have the Writing read, though it be contrary to his Intent and Meaning, yet it ſhall bind him, if he ſeal and deliver it, for it was his Folly that he did not deſire to have it read. *Co.* 2 *Rep. f.* 3. &c.

Where and how Rent ought to be demanded to take Advantage of a Re-entry for Non-payment.

Where one makes a Leaſe rendring Rent to be paid at a Place off from the Land, a Demand on the Land is not ſufficient, but it muſt be made at the Place appointed. *Trin.* 5 *Jac.* C. B. *Ventris's* and *Farmer's* Caſe. 1 *Brownl.* 96.

The Demand ought to be at the Setting of the Sun on the Day of Payment, and at the moſt notorious Place. *Paſch.* 5 *Jac.* C. B. The Dean and Chapter of *Chicheſter's* Caſe. 1 *Brownl.* 138.

If the Leſſor would take Advantage of a Re-entry for Non-payment of Rent, he or the Perſon he empowers to demand it for him, muſt

must take care not to demand a Penny more or leſs than is due, and muſt ſhew the Certainty of his Rent, and when it was due, or the Demand is not good, and no Re-entry ſhall be given unleſs the Demand be preciſely and ſtrictly followed. *Mich.* 31. *Eliz.* C. B. *Falicon & Windſor. Leon.* 35.

Leſſee at Will cannot determine his Will without paying his Rent.

Where a Leaſe is made of Lands at Will rendring Rent, the Leſſee cannot determine his Will two or three Days before the Rent is payable, and ſo defraud the Leſſor of his Rent, any more than the Law will allow the Leſſor to determine his Will, after the Lands are ſown; but as the one ſhall have the Emblements, the other ſhall have his Rent: So that the Leſſee cannot determine his Will but at the Rent-Day, unleſs he pays Rent until the next Day of Payment after his Departure. 1 *Siderfin* 369.

Tenant muſt pay his Rent tho' kept out of his Houſe by an Enemy, and Equity cannot relieve him.

Where a Tenant is held by Force out of his Farm or Tenement by Soldiers in Time of a Rebellion, a Court of Equity cannot relieve him, but he muſt pay his Rent: So where his Grounds are overflow'd that he can receive no Profit by them, he muſt pay his Rent notwithſtanding,

nor can he be relieved in Equity: Sir *John Harriſon* againſt the Lord *North. Paſch* 19 *Car.* 2. *Chanc. Caſes* 1 *part p.* 83.

Leſſor once accepting Rent cannot take Advantage of a Re-entry.

A Leaſe was made with a Condition of Re-entry for Non-Payment of Rent, the Leſſee paid his Rent to the Leſſor who accepted it and put it up; but afterwards finding bad Money amongſt it, he refuſed to carry it away, and entred for the Condition broken. It was adjudg'd that this Entry was unlawful, for his having once accepted the Rent, bars him from taking any Advantage. *Wade's* Caſe. *Trin.* 43 *Eliz.* C. B. *Rot.* 406.

Where the Leſſor ſhall enter for Waſte done, and where not.

If a Leaſe be made upon Condition that the Leſſee ſhall do no Waſte, and he does commit Waſte; if the Leſſor afterwards accepts the Rent, he cannot enter: But if the Condition had been, if he committed Waſte, that then his Eſtate ſhould ceaſe, there no Acceptance of the Rent could make the Leaſe good. *Mich.* 29. *Eliz.* B. R. *Godb.* 47.

Aſſignee who has aſſign'd over not chargeable with the Rent.

Covenant for Rent was brought againſt the Aſſignee of a Term for Rent due after the Aſſignee had aſſign'd that Term over to another, he not having given the Leſſor any Notice

Notice of his Aſſignment; and reſolv'd by the whole Court that Notice was not neceſſary. *Pitcher v. Tovey Mich.* 3 *W. & M.* B. R. *Show.* 340.

Covenant will not lie in England for Rent of Lands in Ireland, tho' made payable here.

A Leaſe was made of Lands in *Ireland*, with a Covenant for Payment of the Rent in *London*: And it was reſolv'd that an Action of Covenant cannot be brought in *England* for Rent reſerv'd on a Leaſe of Lands in *Ireland*. *Barker v. Damer. Hill.* 2 W. & M. B. R. *Show.* 191. *Salk.* 80.

The Words *Yeilding and Paying* are an expreſs Covenant for Payment of Rent. 1 *Siderf.* 266.

On a Leaſe at Will the Plaintiff muſt ſhew the Defendant occupied the Premiſſes.

In Debt for Rent upon a Leaſe at Will, the Plaintiff muſt ſhew the Defendant occupied the Premiſſes: for the Rent is due only in reſpect of the Occupation, and therefore it muſt appear to the Court when the Leſſee entred, and how long he occupied: But in Debt for Rent upon a Leaſe for Years, the Plaintiff need not ſet forth any Entry or Occupation, for if the Defendant neither enters nor occupies, he muſt pay the Rent, it being due by the Leaſe or Contract, and not by the Occupation. *Bellaſis v. Burbrick. Mich.* 8 W. 3. C. B. *Salk.* 209.

Otherwiſe on a Leaſe for Years.

Proof of actual Entry not necessary in Ejectment.

In Ejectment, on a Condition of Re-entry for Non-payment of Rent, the Confeſſion of Leaſe, Entry and *Ouſter* is ſufficient, and Proof of actual Entry and *Ouſter* is not neceſſary. *Little v. Heaton. Salk.* 259.

CHAP.

CHAP. IV.

Of Corn ſown, who ſhall have the Crop. Of Eſtovers, and Trees blown down. Of Diſtreſſes: What Things may be diſtrained, and how uſed: Who may take a Diſtreſs; for what Cauſe, when, and where.

IT is an uſual Saying, and generally received Opinion, that he that ſows muſt reap: but as there is no general Rule without ſome Exception: ſo this holds not always, that he that ſows ſhall reap.

But touching the Sowing of Corn; *Sowing and Reaping* if the Tenant be outed, or his Term ends before it be ripe, who ſhall have the Corn I have already ſet down in the firſt *Chapter*, under the Title of *Tenant at Will:* For if a Tenant at Will ſow his Land, and the Landlord put him out before the Corn be Ripe, he ſhall have Liberty to reap and carry away his Corn, *By Tenant.* becauſe he knew not when his Landlord would put him out.

By Landlord. But it is contrary with a Tenant who hath a Leaſe for Years: For if his Leaſe be out before the Corn be ripe, his Landlord ſhall have it, becauſe he knew the End of his Leaſe: Wherefore if he ſowed, it is in his own Wrong, unleſs there be a Covenant in his Leaſe between the Leſſor and him, that he ſhall have his Way-going Crop. *Vide antea.*

Hemp or Flax, &c. But if a Tenant at Will ſet Roots, or ſow Hemp or Flax, or any thing that brings in any yearly Profit; if after the Planting the Leſſor out him, or if the Leſſor die, yet the Tenant or his Executors ſhall have the Crop. But it is otherwiſe if he plant young Fruit-Trees, or other yourg Trees, as Oaks, Aſhes, or Elms, or ſow the Ground with Acorns; in this Caſe, if the Leſſor out him, he ſhall have none of theſe, becauſe theſe yield no yearly Profit at preſent.

Where an Action lies againſt ſuch as hinder Taking away his Emblements, as Corn growing, Graſs, Fruit of Trees, Hemp, Flax, *&c. Co. Lit.* 56. *Keilw.* 125, 160.

Executors. If a Tenant for Life ſoweth the Ground, and die before the Crop be ripe, his Executors ſhall have it, and

and ſo they ſhall have Graſs if it be cut; but if it be *unmown*, they ſhall not have it, for that is Part of the Inheritance till it be ſevered.

Every Tenant that hath an Eſtate incertain, ſhall have the Corn ſown by him, though he be outed before it be ripe. *What Tenant.*

If the Leſſee ſow the Land, and then ſurrender his Term, the Leſſor, or he to whom the Surrender is made, ſhall have the Corn; ſo if a Man enter for Condition broken, he ſhall have the Corn, and not he that ſoweth the Corn, for his Entry over-reacheth the Eſtate of the other. *Godb. Rep.* 189 *Where Leſſor ſhall have the Corn.*

If a Leſſee for Years ſow the Land, and then commits Waſte, and the Leſſor recovers the Land in an Action of Waſte; here the Leſſor ſhall have the Corn ſowed. *Perk. Sect.* 515. *Cowel's Inſt.* 152. Simile.

If a Tenant for Life leaſe for Years, and the Leſſee ſows the Ground, and before it be ripe the Tenant for Life dies; yet notwithſtanding the Leſſee for Years ſhall have the Corn, or his Executors if he be dead. *Co. Lit.* 55. *b.* *Where Leſſee ſhall.*

Tenant for Life, Remainder in Fee, Tenant for Life leaſeth for Years; the Leſſee is ouſted by a

Stranger, and the Stranger ſows the Land, and the Tenant for Life dies: In this Caſe it was reſolved, that the Corn of Right belonged to the Leſſee of Tenant for Life, and not to the Stranger, nor him in Remainder. *Goldſ. Rep.* 143. *pl.* 60. 5 *Co.* 85.

He that manured.

If *A.* leaſe Land for the Life of *B.* and ſow the Land, and before the Corn be ripe *B.* dies, yet notwithſtanding *A.* ſhall have the Corn, for his Eſtate was determined by the Act of God; and the Reaſon why a Man which hath an uncertain Eſtate ſhall have the Corn, is, for that he hath manured the Land; and therefore it is Reaſon, that he that laboureth ſhould reap the Fruits of his Labour: Therefore if a Man make a Leaſe for Life of Ground ſowed, and before Severance the Leſſee dies; in this Caſe the Leſſor ſhall have the Corn, and not the Executor of the Leſſee for Life, for the Corn came not of the Manurance of their Teſtator. And if Leſſee for Life ſow the Land, and then aſſign over his Intereſt, and dies before the Corn be ſevered; here he in Reverſion ſhall have the Corn, and not the Aſſignee of the Leſſee for Life. *Goldſ. Rep.* 144.

Simile.

Reverſioner.

If

If a Man by his Will deviſe Lands ſowed to one for Life, and after his Deceaſe the Remainder to another for Life, and the firſt Tenant enters and dies before Severance, and he in Remainder enters; now he ſhall have the Corn; and not the Executors of the firſt Tenant for Life. *Goldſ. Rep.* 144. *Remainder Man.*

If a Man be ſeiſed of Land in Right of his Wife, and ſow the Land, and die, his Executors ſhall have the Corn; but if they be Joint-Tenants of the Lands and the Husband ſoweth the Ground and dieth, the Wife ſhall then have it. *Co. on Lit. f.* 55. *b. Perkin's Sect.* 518. *Dyer* 316. *Wife.*

And if a Woman who is a Tenant for Life or in Dower, take an Huſband, and he ſow the Land, and before it be ripe ſhe dies, yet the Huſband ſhall have the Corn. *Cowell's Inſt.* 141. *Swinb. Sect. 6. p.* 163.

And ſo if the Husband let the Lands of his Wife for Years, and the Leſſee ſows the Lands, and before Severance the Wife dies, yet the Leſſee ſhall have the Corn, or his Executors, if he be dead. The like Law of Leſſee for Years of Tenant by the Courteſy, when Tenant by the *Leſſee's Benefit.*

the Courteſy dies before his Leſſee's Corn is ripe and ſevered. *Cowell's Inſt. p.* 141.

Leſſor's Benefit. If a Woman who holds Lands *Durante viduitate ſua* ſow the Ground, and then takes Husband before the Corn be ſevered; in this Caſe the Leſſor ſhall have the Corn. And ſo if Tenant at Will ſow the Land, and then will occupy the Land no longer, he ſhall then loſe the Corn; and the Reaſon hereof is, becauſe the Determination of their Eſtates grew by their own Act. *Co. on Lit.* 55. *b.* 5 *Co. Rep.* 119.

Leſſee's Benefit, But if ſuch a Woman who holds Land *Durante viduitate ſua*, leaſe the ſame Lands to another, and the Leſſee ſows the Land, and then the Woman takes Husband, which determines her Eſtate, yet notwithſtanding the Leſſee ſhall have the Corn. So if Tenant for Life leaſe for Years, and the Teſſee ſows the Lands, then Tenant for Life commits a Forfeiture, ſo that his Leſſor enters, yet the Leſſee of Tenant for Life ſhall have the Corn; but if Tenant for Life ſows the Lands, and then commits a Forfeiture, and the Leſſor enters, here he ſhall have the Corn, and not Tenant for Life, becauſe the

Contra.

De-

Determination of his Eſtate grew by his own Act. *Goldſ. Rep.* 189.

A Leaſe made by the Husband of the Wife's Land in his own Name only is void after his Death; but if the Leſſee have ſown the Land, he ſhall have the Corn. *Noy's Max.* 70.

Recovered by Title Paramount.

It there be a Landlord and Tenant, and the Land is recovered by a Title Paramount againſt the Landlord; in this Caſe, if the Tenant have ſowed the Land, he that recovered ſhall have the Corn, if it be not ſevered before Judgment; but if a Common Recovery be had againſt the Landlord in a Writ of Entry *en le poſt*, or in any other Writ by a falſe and feigned Title, in ſuch Caſe the Leſſee ſhall have the Corn. *Co. on. Lit.* 142. *Perkins Sect.* 515.

Where the Heir.

If an Abator, after the Death of the Anceſtor, enter and ſow the Land, and after the right Heir doth enter; in this Caſe the Heir ſhall have the Corn. So if a Diſſeiſor ſow the Land, and then the Diſſeiſee entreth upon him, or recovereth in an Aſſize before the Corn be ſevered; in this Caſe the Diſſeiſee ſhall have the Corn; but if it were ſevered before the Entry or Reco-

Where Diſſeiſor. Recovery, though it remain ſtill upon the Land in Sheaves or Cocks, there the Diſſeiſor ſhall have it. But it is otherwiſe in the Caſe of Trees ſevered from the Land; for if they be not carried off the Land before the Diſſeiſor's Entry, he ſhall then have them. *Goldſ. Rep.* 144. *Perk. Sect.* 519.

Widow. If a Widow have Land aſſigned to her by the Sheriff for her Dower, and this Land is ſowed with Corn; here ſhe ſhall have the Corn. *Vide Perk. Sect.* 521. 15 *Eliz. Dyer* 319.

Her Executors. *Note.* That the Statute of *Merton*, *ch.* 2. which giveth, *Quod omnes Viduæ de cætero poſſint legare blada*, &c. as unto this Point, is but in Affirmance of the Common Law; for if Tenant in Dower ſoweth the Land which ſhe holdeth in Dower, and dieth before Severance, her Executors ſhall have the Corn if ſhe do not deviſe it to another: and ſo was the Law taken in the 4th of *H.* 3. *Deviſe* 6. which was ſixteen Years before the Making of the Statute of *Merton*. *Perk. Sect.* 522. *C.* 2. *part Inſt.* 83.

Executors. If Tenant in Tail ſow the Land, and give me the Corn, and die before I have ſevered it from the Land, yet

yet I may afterwards ſever the ſame and take it; for that the Executors of the Tenant in Tail ſhould have had it. *Perk. Sect.* 59.

Trees cut by Tenant in Tail.

But if Tenant in Tail give or ſell to me a Tree growing upon the Land, and dies before I have the Tree, and his Iſſue entreth into the Land where the Tree is growing, now I cannot cut the Tree but he may have Treſpaſs againſt me: But it ſeems, if it were cut in his Life-time, I may then take it away after his Death. But *Quære* of this; for ſome are now of a contrary Opinion. *Kitch.* 226. a. b. 27 *H.* 8. *f.* 6. *p.* 18. *E.* 4. *f.* 6. a. and *Hill.* 18 *E.* 4. *f.* 21. in the End. *Perk. Sect.* 58.

Trees.

If Tenant in Fee-Simple give or ſell me a Tree growing upon his Land, and die before I have cut it, yet I may have it after his Death if I pleaſe. *Perk. Sect.* 58.

Eſtovers.

There are three Kinds of *Eſtovers* in the Law, which is incident to the Eſtate of every Tenant, whether it be for Life or Years.

1. *Houſe-boot*, Of which there are two Kinds; the one to repair the Houſes, the other to burn, which is called *Fire-boot*.

2. Then

2. Then there is *Eſtovers*, called *Plough-boot*; that is, Stuff to mend the Tenants Ploughs, Carts, Harrows, Wains, and for making Rakes and Forks for getting in his Hay and Corn.

3. There is another Kind of *Eſtovers* called *Hedge-Boot* or *Hay-boot*; this is Timber and Wood for making Gates and Stiles, and Boughs and Buſhes for mending and repairing Hedges and Fences.

1. So there is *Eſtoverium ædificandi & ardendi*, Houſe-boot.

2. *Eſtoverium arandi*, or Plough-boot.

3. *Eſtoverium claudendi*, Hedge-boot or Hay-boot.

Definition of Eſtovers. *Eſtover* or *Boot* ſignifies an Allowance, Compenſation or Satisfaction; and any of all theſe Boots aforementioned a Tenant may take without Aſſignment of the Landlord, unleſs he be by the Landlord reſtrained by ſpecial Covenant in his Leaſe, which is very uſual amongſt many Landlords, eſpecially if the Farm be any Thing conſiderable, then they commonly limit the Tenant how much *Houſe-Boot* or *Plough-boot*,

boot, or *Hedge-boot*, he may take without Aſſignment, and how much by Aſſignment. *Vide* 2 *Co. Inſt. f.* 18. *Termes de la Ley*, &c.

If a Tenant for Life or Years cut down Trees, or pull down Houſes, or ſuffer them to fall down, the Leſſor ſhall have the Trees and Timber of the ſaid Houſes; for the Leſſee had them only as Things annexed to the Land, and this Severance will not give him a greater Eſtate in them, but his Intereſt is then determined. *Co. l.* 4. 31, 62, *&c.* *Trees cut by Tenants for Life, &c.*

The Landlord ſhall likewiſe have Windfalls; that is, Timber-Trees blown down by Wind and Tempeſt, becauſe they are Parcel of his Inheritance, ſo that the Tenant for Life nor Years cannot have them, unleſs it be to build withal, where Houſes are in Decay; but if they be Dotards or Pollards without Timber, which bear neither Leaves nor Fruit in Summer, the Tenant ſhall have ſuch when they are blown down. *Dyer* 332. *Windfalls.*

Eſtovers granted to be burnt in ſuch an Houſe, ſhall go to him that hath the Houſe by whatſoever Title: For one is inſeparably incident to the other. *Eſtovers.*

other. *Finch l.* 1. *c.* 3. *p.* 15. 1 *Perk. Sect.* 104. *Kitchin* 51. *a.*

What Property. Leſſee for Life or Years, Tenant in Dower, or by the Courteſy, or Tenant in Tail after the Poſſibility, *&c.* have only a ſpecial Intereſt or Propriety in the Trees, as Things annexed to the Lands, ſo long as they are annexed thereunto; but if they or any other ſever the Trees from the Land, then their Intereſt is determined and the Leſſor may take the Trees as Things that are Parcel of his Inheritance, the Intereſt of the Leſſee being determined. 4 *Co. Rep. f.* 62. *Noy's Max.* 65.

Trees cut by Stranger. If a Stranger cut down a Tree, growing upon the Land of the Leſſee for Years, and carry it or the Bark thereof away; the Leſſor at his Election may either have an Action of Trover againſt the Stranger, or an Action of Waſte againſt the Leſſee; for the Property of the Timber is always in the Leſſor, *non obſtante* the Statute of *Glouceſter* which gives him his Action of Waſte, and ſo was the Opinion of *Jones*, *Whitlock* and *Richardſon*, *Hill.* 7 *Car.* 1. *in B. R. Berry* and *Reed's* Caſe. *Cro. Rep.* 1 *par.*

If

If one hath Eſtovers in certain in ten Acres of Wood, and five of them deſcend to him, he ſhall have the Whole out of the Reſidue. *Critica Juris Ingenioſa, p.* 123.

If a Man grant to another Eſtovers in certain in ſuch a Wood, and afterwards the Grantor makes ſuch Waſte in the Wood, as that there is not ſufficient Store left, out of which the Grantee may take his Eſtovers; in this Caſe he may have a *Quo Minus* againſt the Grantor, which is in Nature of a Prohibition, forbidding him to make ſuch Waſte. See after concerning *Waſte*. *Eſtovers waſted.*

Concerning Diſtreſſes, Replevin, and Avowry, &c.

Diſtreſs is a Law of Cuſtom; that is, if Rent be in Arrear and unpaid, the Landlord may take a lawful Diſtreſs; and that he ſhall put in Pound Overt, there to remain until he be ſatisfied of what he diſtrained for. *Diſtreſs by Cuſtom.*

So that if a Landlord diſtrain the Cattle for Rent, and put them in a Pound Overt, and the Beaſts die there for Lack of Meat, it is at the Peril of him that owned the Beaſts, *Pound Overt.*

Beasts, and not of him that distrained: For in him that distrained, there can be assigned no Default, but the Default was in the other, because the Rent was unpaid. *Dr. & St. l.* 1. *c.* 5. *p.* 10.

Of what. Now a Distress must be made of such a Thing, wherein some Body hath a certain and valuable Property; therefore such Things as are *Feræ Naturæ*, cannot be distrained; neither can any one distrain a Horse if any Body be on the Back of him; nor any Thing which a Man holds in his Hands, or carrieth about him, annexed to his Body.

General Rule. And altho' the Law be, That the Landlord may distrain any Thing that he finds *Levant* or *Couchant* upon the Premisses for his Rent behind, whose Goods or Chattels soever it be, and may detain the same until his Rent be satisfied; yet this General Rule hath some Restriction and Limitation, for there are several Things whereof a Distress cannot be taken.

What cannot be distrained for Rent. Such Things as are for the Maintenance and Benefit of Trade, cannot be distrained for Rent; as an Horse in a Smith's Shop, nor an Horse in an Inn cannot be distrained for

for the Rent thereof; nor the Materials in a *Weaver*'s Shop, nor the Making of Cloth, nor Cloth or Garments in a *Taylor*'s Shop, nor Sacks of Corn, nor Meal in a Mill for the Rent thereof; nor any Thing that the Tenant hath diſtrained for *Damage feſant*, for that is in the Cuſtody of the Law. *Noy*'s *Max.* 124. *Terms of the Law*, Tit. *Diſtreſs.*

Likewiſe Oxen of the Plough may not be diſtrained; nor a Mill-ſtone, though it be raiſed to be picked, ſo long as it lies upon the other Stone. *Co. Lit. f.* 47. *Oxen.*

Neither may a Diſtreſs be taken of *Sheep*, if there be a ſufficient Diſtreſs beſides. *Sheep.*

Neither can a Man ſever Horſes joined together, or to a Cart; 1 *Vent.* 36. but he ought to have diſtrained Cart and all, according to 20 *Ed.* 4. 3. *Horſes.*

Likewiſe Victuals, nor Sheafs or Shocks of Corn, cannot be diſtrained: But Carts or Wagons loaded with Corn may be diſtrained, either for Rent or *Damage feſant*. *Co. Ibid.* But ſee afterwards the late Act made for Diſtreſſes.

A Diſtreſs of a Cart loaden with Corn and four Horſes to it, was *Cart and Horſes.*

adjudged not to be exceſſive, becauſe he could not ſever the Horſes. *Vide* 3 *Cro.* 7. 2 *Vent.* 183.

Tools fix'd. No Man's Tools wherewith he works at his Trade ſhall be diſtrained; as the Carpenter's Ax, or a Scholar's Books, *&c. Coke, Ibid.*

Things fixed. Neither can any Thing which is fixed to the Freehold be diſtrained, as Furnaces, Coppers, or Fats fixed for Dyers or Brewers, (although the Tenant may remove them during the Term) nor the Windows or Doors of a Houſe while they are upon the Hinges. But if they be removed off from the Hinges, they may be diſtrained.

Tables. The Landlord cannot diſtrain Tables dormant in the Houſe of his Tenant, or any Thing which cannot be attached in an Aſſize; neither can any Thing be diſtrained, of which the Sheriff cannot make a Replevin, or that cannot be reſtored again in as good a Condition as it was when it was diſtrained.

Stranger's Beaſts. But a Man may diſtrain the Beaſts of a Stranger (that come by Eſcape) for Rent, though they have not been *Levant* and *Couchant* upon the Ground, according to *Coke*, 1 *par. Inſt. f.* 47.

The Lord of a *Leet* may ſell a Diſtreſs taken for an Amerciament in his *Leet*; as the King may ſell a Diſtreſs, becauſe it is the King's Court. *Lord of a Leet.*

But it is noted, That a Court-Leet can amerce for nothing, but only publick Nuſances, and not for particular Treſpaſs or Damage to the Lord, or any other. *Vide* 1 *Saund.* 135.

And ſee 1 *Vent.* 105. *Raym.* 204. That although by Common Right a Diſtreſs may be taken for a Fine in the Court-Leet; that is, where it is impoſed for ſuch Things as are of common Right incident to it's Juriſdiction, as for Contempts and the like; yet where Cuſtom only enables them to ſet a Fine, it cannot be diſtrained for, without a Cuſtom ſo to do.

That for Amerciaments in a *Leet*, the Lord may diſtrain, although it be in the Highway; but for Amerciaments in a Court-Baron he may not, neither for an Amerciament in a *Leet*, in a Place ſeiſed into the King's Hands for the King's Debt. *Vide Dr. & St. l.* 2. *c.* 9. *For Amerciaments.*

If a Man diſtrain Goods or Chattels, he may put them where he will, either in a *Pound Covert* or *Overt*: But if they take any Harm, he muſt anſwer *Goods.*

answer for them. *Dr. & St. l.* 2 *c.* 27. But see after.

Cattle. If they be living Cattle, they ought to be put in a common Pound, or else in some open Place, as in his own Yard or Close that distrained them, or in some other's by his Consent; so that the Owner may come lawfully to feed them: And the Owner of the Cattle must have Notice where they are, if they be not in a common Pound; and then if they die for want of Meat, it is the Owner's Fault (as it is said before) but if they be in a Pound Covert, or out of the County, and die for Want of Meat, then he that distrained them shall make Satisfaction for them.

Pound Covert.

Cattle taken *Damage feasant*, may be impounded in the same Pound where they are *Damage feasant*; but Goods or Cattle taken for other Thing may not. *Kitchin*, *f.* 207. But see after.

Within the County, &c. No Man ought to drive a Distress out of the County where it is taken, nor out of the Hundred, but to a Pound *Overt* within three Miles; neither may a Distress be impounded in several Places; nor above four Pence taken for the Fees of Impounding

ing one whole Diſtreſs, on Pain of five Pounds. *Co.* 1 *par. Inſt. p.* 57. *Raſtal*, Tit. *Diſtreſs*, 11.

If a Man diſtrain Beaſts *Damage feſant*, and put them in the Pound *Overt* within the ſame County, not above three Miles out of the Hundred; and the Owner ſuffer the Beaſts to die for Lack of Meat, the Loſs is his own, and he that diſtrained them may be at Liberty to bring his Action for the Treſpaſs, if he will; and if it be not a lawful Pound, then it is at the Peril of him that diſtrained them; and ſo it is, if he drive them out of the Shire, and they die there. *Dr. & St. l.* 1. *c.* 27. *Within three Miles, &c.*

If the Owner of the Cattle tender Amends to him that diſtrained, and he refuſe it, yet the Owner may not take his Cattle out of the Pound, for he may not be his own Judge, and if he do, a Writ *De Parco fracto* for Breaking the Pound lieth againſt him: But he muſt ſue a *Replevin* to have his Cattle delivered him out of the Pound, and afterwards plead his Tender of Amends, of which the Jury muſt end the Controverſy. Alſo the Owner muſt look to give them Meat. *Ibid.* *Amends tendered.*

Replevin. But if the Owner of the Cattle procure a *Replevin* to deliver them, and he that deſtrained them reſiſt it, and will not deliver them; in this Caſe, if they die after for Want of Meat, it is at the Peril of him that diſtrained, and the Owner ſhall recover Damages againſt him in an Action upon the Statute for not obeying the King's Writ. *Ibid.*

Parco fracto. If a Man ſends his Servant to take a Diſtreſs for Rent or Service, who puts it in the Pound; if the Owner of the Beaſts or a Stranger take them out, the Maſter ſhall have an Action *De Parco fracto* for breaking of the Pound.

In another's Cloſe. And if one diſtrain Cattle, and pound them in another Man's Cloſe with his Conſent, and the Owner of the Cattle come and take them out; in this Caſe he that made the Diſtreſs ſhall have this Action for Pound-breach, and the Owner of the Cloſe an Action of Treſpaſs for breaking of his Cloſe.

If a Man break the Pound and take out my Goods, he that diſtrained may have *Parco fracto* againſt the Party; and may alſo take the Goods again whereſoever he finds them,

them, and put them in the Pound again. *Co. Lit. f.* 47. *b. &c.*

A Man diſtrained for Ten Pounds due at *Michaelmas* for Rent, Goods which were not of the Value of Forty Shillings, and afterwards diſtrained for the Reſidue, and it was adjudged that he could not avow, for the Diſtreſs is not good, and it was his Folly that would not take a ſufficient Diſtreſs at firſt: But if a Man be behind of his Rent at ſeveral Days, and the Leſſor take a Diſtreſs for one Day at one Time, and for another Day at another Time, this is good. *Moor's Rep. pl.* 26. But ſee after, *Stat.* 17 *Car.* 2. And ſee the late Act. *Two Diſtreſſes.*

If the Lord diſtrain the Cattle of his Tenant, although nothing be behind, the Tenant for the Reſpect and Duty which he owed to the Lord, and which belonged to him, ſhall not have an Action of Treſpaſs againſt him *Vi & Armis:* But if the Lord command his Bailiff in ſuch Caſe to diſtrain where nothing is behind, the Tenant ſhall have an Action of Treſpaſs *Vi & Armis* againſt the Bailiff. *Hugh's Grand Abridgment*, 1 *Par. p.* 311. *c.* 7. *Co.* 4 *Rep. f.* 11. *If by the Lord.*

If there be Lord and Tenant by Rent or other Service, if the Rent be behind, the Lord may enter into the Tenant's Houſe, if the Door be open, and diſtrain for the Rent or Service, notwithſtanding that the Tenant holdeth Lands in which he may diſtrain. 38 *H.* 6. 28. *Co.* 5 *Rep. f.* 92. But a Lord cannot break open the Gates, or break down Fences and Incloſures to make a Diſtreſs. *Co. Lit.* 161. a.

For a Rent-Charge. If a Man ſeiſed of Lands in Fee maketh a Leaſe for Life thereof, and afterwards he granteth a Rent-Charge; though the Grantee cannot diſtrain the Cattle of a Stranger who is in Poſſeſſion of the Land for the Rent, yet if the Grantor's Cattle come upon the Land, he may then diſtrain them for the Rent. *Brownl.* 1 *par. f.* 32.

Exceſſive Diſtreſs. *Note*, The Statute of *Marlebridge*, *Chap.* 4. forbids the Lord to take exceſſive Diſtreſſes upon his Tenant for Rent or Services, on Pain of being grievouſly amerced. As for Example, If the Lord diſtrain two or three Oxen for Twelve-pence, or the like ſmall Sum, and the Owner bring a Replevy of the Oxen, and then the Lord avow the Taking of them

them for Twelve-pence; here of his own Shewing he ſhall make Fine, *&c.* or the Party grieved may have his Action upon the Statute. *F N.B.* 89. 8 *H.* 4. 16. 11 *H.* 4 2. *Regiſt.* 97. *Co.* 2 *par. Inſt. f.* 107.

But if the Lord diſtrain an Ox or an Horſe for a Penny, if there were no other Diſtreſs upon the Land holden, then this Diſtreſs is not exceſſive; but if there were a Swine or Calf, *&c.* then the Taking of the Ox or Horſe is exceſſive, becauſe he might have taken a Beaſt of leſs Value. 2 *Co. Inſt. f.* 107.

No Informations lies.

Yet an Information lies not againſt a Landlord for making exceſſive Diſtreſs of Tenants, becauſe he ought to be amerced by the Statute of *Marlebridge, c.* 4. Whereas upon an Information he muſt of Neceſſity be fined. 1 *Vent.* 104. 2 *Inſt.* 107. *Raym.* 193, 205. 1 *Mod.* 71, 288.

Of Common Right.

There be certain Caſes where a Man may diſtrain of common Right, and where not of common Right: A Man may diſtrain for Rent-Service, Homage, Fealty, Eſcuage, Suit of Court, or for Rent reſerved upon a Gift in Tail, Leaſe for Life, Years, or at Will, though there be no Clauſe of Diſtreſs in the Leaſe; becauſe

theſe Diſtreſſes are of common Right. *Co* 1 *par. Inſt. f.* 204, 205.

Services incertain. But for Debt, Account, Treſpaſs, or for Reparations, or the like, a Man cannot diſtrain, neither can any Diſtreſs be taken for any Services which are not certain, nor can be reduced, or brought into any Certainty. And upon an Avowry, Damages cannot be recovered for that which neither hath Certainty, nor can be reduced to Certainty. *Dr. & St. l.* 3. *c.* 4, 9.

Incertainty reduced to Certainty. Nevertheleſs (altho' it be a Paradox) in ſome Caſes there may be a Certainty in an Incertainty: As for a Man to hold of his Lord to ſhear all his Sheep depaſturing within the Lord's Manor; and this is certain enough, although the Lord hath not always a certain Number of Sheep, but ſometimes a greater Number, and ſometimes a leſſer; yet this Incertainty, being reduced to the Manor which is certain, the Lord may diſtrain for. And a Diſtreſs is inſeparably incident to every Service that may be reduced to Certainty.

Surpluſage of Rent. If there be Lord and Tenant, and the Tenant pay the Lord a greater Rent than is due to him, and that voluntarily without Coercion or Diſtreſs;

ſtreſs; in this Caſe the Lord having gained Seiſin, may diſtrain for ſuch Surpluſage of Rent, and the Tenant cannot avoid it upon the Lord's Avowry, becauſe of the Seiſin of the Rent: but in ſuch Caſe he may have his Remedy by a Writ of *Ne injuſte vexes* upon the Statute of *Magna Charta*, *c.* 10. *F.N.B.* 11. *Co.* 1 *p. Inſt. f.* 25.

But *note*, This Rule holdeth not in the Caſe of a Succeſſor or Iſſue in Tail, for they may avoid ſuch Incroachment in an Avowry; or if the Incroachment be of another Nature than the Service, if that it be gained by Coercion of Diſtreſs, in ſuch Caſe the Tenant may avoid ſuch Seiſin in an Avowry. *Co.* 2 *Inſt. f.* 21. *Exception.*

A Rent-Charge was granted for Years, with a *Nomine Pœne* and Clauſe of Diſtreſs, if it were not paid at the Day, and the Rent was behind and the Years incurred, and it was moved, if the Grantee might diſtrain for the *Nomine Pœne*, the Years being incurred? And the Opinion of the whole Court was, That he could not diſtrain for the *Nomine Pœne*, for that did depend on the Rent, and the Diſtreſs was gone as to both. *Rent-Charge.* *Nomine Pœne.*

Paſch. 19 *Jac. in C. B. Tatter* and *Fryar's* Caſe. *Winch, Rep. f.* 7.

Eſtray. If an Horſe or Beaſt come into a Man's Ground as an Eſtray, he may not work them; neither may a Man work a Diſtreſs, for he hath neither Property or Poſſeſſion *in Jure*; but if a Man hath an Horſe, Ox or Cows in Pawn, he hath a ſpecial Property in them, and may work and uſe them in ſuch Sort as the Owner may do. *Owen's Rep. f.* 123. *Cro.* 2 *par. f.* 148.

Foreſtalling the Way. If the Tenant foreſtall the Way with Force and Arms, and threaten in ſuch Manner that the Lord dares not come to demand or diſtrain for the Rent; or if there be no Diſtreſs on the Ground, nor none ready to pay the Rent, then in this Caſe the Lord may have a Writ of *Novel Diſſeiſin* againſt the Tenant, and recover his Rent and Arrearages: And if the Rent be behind onother Time, he may have a *Rediſſeiſin*, and recover double Damages *Co. Lit.* 153. b. 161. b. *Fleta, l.* 1. *c.* 42. *Noy's Max. p.* 45.

Novel Diſſeiſin.

Heriots. Alſo for Heriot-Service the Lord may diſtrain or ſeiſe; but for Heriot-Cuſtom he cannot diſtrain, but may ſeiſe. *Dr. & St. f.* 75.

Tenant

Tenant to pay a Heriot-Beaſt, or 5 *l.* at the Election of the Leſſor.

A Bailiff may not diſtrain for ſuch Heriot before the Leſſee hath declared his Election, though the Leſſor may. *Lit. Rep.* 33, 35.

An Heriot ſhall go with the Reverſion as well as the Rent, and for which the Grantor may diſtrain. 2 *Saund.* 166. *Vide antea.*

Alſo it ſeems that a Bailiff, where a lawful Tender of Rent has been refuſed, may not diſtrain without the Command of the Leſſor. *Lit.* 34. *Vide ibid.* 65. *Tender.*

Where a Leaſe is made to commence on the Determination of another, if the new Leſſee dies before his Term commences, it's ſaid the Heriot reſerved ſhall not be due. 1 *Vent.* 91. 2 *Saund.* 165. 2 *Keb.* 677. 1 *Sid.* 437. *Heriot.*

If a Man hath Common without Number, yet he ought not to ſurcharge the Soil, but that the Lord may have the Common alſo. 1 *Saund.* 345. *Common.*

And if a Tenant over-charge the Soil where he has Common without Number, the Lord may diſtrain him, but an Admeaſurement does not lie. *Surcharged.*

If a Stranger put his Cattle into the Common, a Commoner may diſtrain them, but in the Avowry he ought to ſhew Damages. 2 *Lev.* 252. 3 *Lev.* 104. And that the Landlord of a Common cannot put in the Cattle of a Stranger. 1 *Lutw. Rep.* 107. See afterwards, *Ch.* 7.

Leaſe ended. Though a Man may not diſtrain for Rent after the Leaſe is ended, nor out of the Premiſſes, (except in ſome ſpecial Caſes) nor in the Night unleſs for *Damage feſant*: Yet the Executors or Adminiſtrators of him who had Lands in Fee, or Fee-Tail, or for Life, may either have an Action of Debt againſt him that ſhould pay it, or diſtrain for it; and ſo may the Husband after the Death of his Wife, his Executors or Adminiſtrators, and he which hath Rent for another's Life, for the Arrearages after his Death.

Executors may.

Grants. The Grantee of a Reverſion may diſtrain for an Heriot. 2 *Saund.* 166.

Beaſts eſcape. If the Beaſts eſcape into any Ground, and the Lord diſtrain them for Rent: the Diſtreſs is good. *Idem* 289, 290. And that 'tis not material whether they were Levant or Couchant, or not. See after.

Where

Where Cattle escaped out of a Close next adjacent; adjudged, that they might be distrained for Rent, altho' they escape through Default of the Fences which the Party distraining ought to have repaired. *Id.* 289. *Want of Fences.*

A Lord of the Soil may distrain for *Damage fesant*, although he have no Interest in the Herbage, for there may be other Damage besides eating the Grass. *Idem* 328. *Soil damaged.*

A Man puts Cattle into my Pasture for a Week, and afterwards I give him Notice that I will keep them no longer, and he will not fetch them away; I may then distrain them *Damage fesant*. *Noy's Max.* 33. *Cattle depasturing.*

If a Man takes Cattle *Damage fesant*, and as he is driving them to Pound, they run into the Yard or House of the Man that owns them, and he refuses to let them out again, he that distrained them may have a Writ of *Rescous* against the Owner of the Beasts for so doing. *Rescous, where.*

If a Landlord come to distrain for Rent, and see the Cattle, and the Lessee or his Servants drive them out of his Fee, he cannot have a Writ of *Rescous* because the Cattle were not in his Possession: But he may follow after them, and distrain them in *Where not.*

in another Man's Ground, it being for Rent, but not for *Damage feſant*; for they muſt be taken *Damage feſant*, that is, doing Damages. *Co. 1 par. Inſt. f.* 161.

Cauſe to be ſhewn. If a Man diſtrain Goods, and declare not the Cauſe or Reaſon wherefore he doth it, if they be put in a Houſe, the Owner may break the Houſe and take them out. *Clayton's Rep. p.* 64. *pl.* 111.

Reſcue lawful. Or if a Man diſtrain Goods without Cauſe, the Owner may reſcue them; but if they be pounded, he cannot break the Pound and take them out, becauſe they are then in the Cuſtody of the Law.

But if he find the Pound-Door unlock'd, he may take them out.

General Prohibition. Altho' there be a general Prohibition in the Laws of *England*, That it ſhall not be lawful for any Man to enter upon the Freehold or Poſſeſſion of another, without Permiſſion and Authority of the Owner, or of the Law; yet this is not without Exception.

Exception. For if a Man drive Beaſts along the Highway, and the Beaſts run into any Man's Corn or Graſs, and he that driveth them goeth after them into the Grounds to fetch them out

out, he may juſtifie that Entry into the Grounds to fetch them out. *Dr. & St. l.* 1. c. 10.

Alſo hindring the carrying of a lawful Diſtreſs, is a Provocation to make killing no more than Homicide. 1 *Vent.* 216. the Caſe of *Goff*, Collector of Chimney-Money. *Homicide.*

The Court held, That Cattle driving to a Market, and put into Paſture by the Way, were not privileged from being diſtrained; for 'tis by the Statute of *Marlbridge*, That Beaſts cannot be diſtrained in the High-way, and not by the Common Law. 2 *Vent.* 50. 3 *Lev.* 260. *Cattle driving to a Market.*

Where one holds a third Part of certain Land, and another two Third Parts of the ſame Land undivided, he who hath the one Part cannot diſtrain the Cattle which were put in by Licence of him who hath the two Parts. *Id.* 228, 283. *Hob.* 80, 103. *Licence.*

If a Man make a Feoffment, and that in Fee by Indenture reſerving a Rent, he cannot diſtrain for that Rent, unleſs a Diſtreſs be expreſly reſerved; and if the Feoffment be made without an Indenture reſerving Rent, that Reſervation is void in the Law. And the like Law is where a Gift in Tail, *Upon a Feoffment.*

Tail, or a Leaſe for Term of Life is made, the Remainder over in Fee reſerving a Rent, that Reſervation is void in the Law.

Clauſe of Diſtreſs.

Alſo, if a Man ſeiſed of Land for Term of Life granteth away his whole Eſtate, reſerving a Rent, that Reſervation is void in the Law, without it be by Indenture: And if it be by Indenture, he ſhall not diſtrain for the Rent, without a Clauſe of Diſtreſs be reſerved. *Dr. & St. l. 2. c. 9.*

Rent reſerved at two Feaſts.

Alſo if a Man makes a Leaſe at *Michaelmas* for a Year, reſerving a Rent payable at the Feaſt of the Annunciation of our *Lady* and St. *Michael* the Archangel; in this Caſe he may diſtrain for the Rent due at our *Lady-day*, but not for the Rent due at *Michaelmas*, becauſe the Time will be expired. *Ibid.*

But ſee after the late Acts. Yet if a Man make a Leaſe at the Feaſt of *Chriſtmas*, for to endure to the Feaſt of *Chriſtmas* next following, *viz.* for a Year, reſerving a Rent at the aforeſaid Feaſts of our *Lady-day* and *Michaelmas*; in this Caſe he ſhall diſtrain for both the Rents as long as the Term continues, that is to ſay, till the aforeſaid Feaſt of *Chriſtmas*. *Ibid.*

And

And if a Man have Lands for Term of Life of *J. N.* and makes a Leaſe for Term of Years, reſerving a Rent, the Rent is behind, and *J. N.* dieth; there he ſhall not diſtrain, becauſe his Reverſion is determined. *Ibid.* *Reverſion determined.*

And if a Town or Pariſh be amerced, and the Neighbours by Aſſent aſſeſs a certain Sum upon every Inhabitant; and agree, That if it be not paid by ſuch a Day, that certain Perſons thereunto aſſigned ſhall diſtrain; in this Caſe, the Diſtreſs is lawful. *Ibid.* *Aſſeſſment by a Town.*

If there be Lord and Tenant, and if the Tenant do hold of the Lord by Fealty and Rent, and the Lord doth grant away the Fealty, and reſerve the Rent, and the Tenant attorneth; in this Caſe he that was Lord may not diſtrain for the Rent. for it is become a Rent-Seck. *Ibid.* *Rent-Seck.*

But if a Man make a Gift in Tail to another, reſerving Fealty and certain Rent, and after that he granteth away the Fealty, reſerving the Rent and the Reverſion to himſelf; in this Caſe, he ſhall diſtrain for the Rent, for the Grant of the Fealty is void; for the Fealty cannot be ſevered from the Reverſion. *Ibid.* *Upon a Gift in Tail.*

Alſo

Upon an Assignment of Rent.

Also if a Rent be assigned to make a Partition or Assignment of Dower Egal, he or she to whom that Rent is assigned may distrain. And in all these Cases aforesaid, where a Man may distrain, he may not distrain in the Night; but for *Damage feasant*, that is, where he finds Beasts doing Hurt in his Ground, he may distrain them Night or Day when he finds them; but for Waste, Reparations, Accounts, or for Debts upon Contracts, or such like, no Man can lawfully distrain.

Amends tendered.

If Beasts be distrained *Damage feasant*, Tender of sufficient Amends makes the Distrainer liable to Damages for Detainer, though not for the Distress. *Lit. Rep.* 34. *Vide c.* 5.

Dead Goods distrain'd must not be put in an open Pound.

If a Man distrain dead Goods which may receive Damage by the Weather, he ought to impound them in a House, or other Pound Covert within three Miles in the same County; for if he impounds them in a Pound Overt, he shall answer for them. *Co. Lit.* 47. b.

Distress must not be tied in an open Pound.

If a Horse leaps over the Pound it is not lawful for the Person distraining to tie him there notwithstanding; for if the Horse receive any Damage, the Owner may have

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an Action of Treſpaſs, according to 27 *Aſſ.* 64. where a Horſe having leaped over the Pound three Times, was afterwards tied to a Poſt there and ſtrangled himſelf.

He who abuſes a Diſtreſs is a Treſpaſſer ab initio.

Where one abuſes a Diſtreſs, he is a Treſpaſſer *ab initio*, and therefore if in Treſpaſs the Defendant juſtifies *nomine diſtrictionis*, the Plaintiff may ſhew an Abuſe and it is no Departure, but makes good his Declaration. *Gargrave. v. Smith. Hill.* 2 W. & M. C. B. *Salk.* 221.

Goods in a Carrier's Cuſtody, cannot be diſtrain'd.

One who was not a common Carrier undertook to carry Goods from *London* to *Birmingham*; and at *Birmingham* put the Goods with the Waggon into his Barn, where they continued two Nights and a Day and then the Landlord came and diſtrained them for his Rent. *Reſolv. per Cur'* That where Goods are deliver'd to any Perſon exerciſing a publick Trade or Employment, to be carried, wrought or managed in the Way of his Trade or Employ, they are for that Time under a legal Protection and privileg'd from Diſtreſs for Rent: And it was further reſolv'd, That any one undertaking for Hire to carry the Goods of all Perſons indifferently, is as to this Privilege a common Carrier,

Carrier, for the Law gives this Privilege in reſpect of the Trader, and not in reſpect of the Carrier. *Gisburn v. Hurſt. Hill.* 8 *Annæ.* B. C. *Salk.* 249.

Where Cattle may be diſtrained before Levant and Couchant, and where not.

Where Cattle eſcape into a Man's Lands through Default of the Leſſor or his Tenants, in not making up the Fences, they cannot be diſtrain'd for Rent arrear for ſuch Lands until the Owner have Notice, or until they have been Levant and Couchant. *Lutwych.* 1578. *Kemp. v. Cruwes*: But where Cattle eſcape by Default of their Owner, and are Treſpaſſers, they may be diſtrain'd for Rent before they are Levant and Couchant, or before the Owner has Notice of their being upon the Lands. *Ib.*

But whether the Lord or the Grantee of a Rent-Charge may not diſtrain the Cattle of a Stranger that have eſcap'd into Lands out of which ſuch Rent is iſſuing, before they have been levant, *&c.* altho' there was a Defect in the Fences, *Vide Lutwych* 1579. where it ſeems to be admitted.

Note, It ſeems Goods and the Tools of a Man's Trade are diſtrainable for a Duty ariſing by Act of Parliament, tho' not for Rent, or Amerciaments, or other Duties due by the Common Law. 2 *Show.* 127. *Sed Quære.*

An

An Act made in the Second Year of the Reign of King *William* and Queen *Mary*, for enabling the Sale of Goods distrained for Rent.

WHereas the most ordinary and ready Way for Recovery of Arrears of Rent is by Distress; yet such Distresses not being to be sold, but only detained as Pledges for inforcing the Payment of such Rent, the Persons distraining have little Benefit thereby. Defect of former Laws.

For the Remedying thereof, be it enacted and ordained by the King and Queen's most excellent Majesties, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by Authority of the same. Remedy.

That from and after the first Day of June, *in the Year of our Lord One Thousand six hundred and Ninety, that where any Goods or Chattels shall be distrained for any Rent reserved and due upon any Demise, Lease or Contract whatsoever, and the Tenant or Owner of the Goods so distrained, shall not within five Days next after such Distress taken, and Notice thereof (with the Cause of such Taking)* Goods and Chattels distrained for Rent. If not replevied within five Days after Notice.

Taking) *left at the Chief Manſion-Houſe or other moſt notorious Place on the Premiſſes, charged with the Rent diſtrained for, replevy the ſame, with ſufficient Security to be given to the Sheriff, according to the Law; that then in ſuch Caſe after ſuch Diſtreſs and Notice as aforeſaid, and Expiration of the ſaid Five Days, the Perſon diſtraining ſhall and may with the Sheriff or Under-Sheriff of the County, or with the Conſtable of the Hundred, Pariſh or Place, where ſuch Diſtreſs ſhall be taken* (*who are hereby required to be aiding and aſſiſting therein*) *cauſe the Goods and Chattels ſo diſtrained to be appraiſed by two ſworn Appraiſers, (whom ſuch Sheriff, Under-Sheriff or Conſtable, are hereby impowered to ſwear to appraiſe the ſame truly, according to the beſt of their Underſtandings) and after ſuch Appraiſment, ſhall and may lawfully ſell the Goods and Chattels ſo diſtrained, for the beſt Price that can be gotten for the ſame, towards Satisfaction of the Rent, for which the ſaid Goods and Chattels ſhall be diſtrained, and of the Charges of ſuch Diſtreſs, Appraiſment and Sale, leaving the Overplus (if any) in the Hands of the ſaid Sheriff, Under-Sheriff or Conſtable, for the Owner's Uſe.*

How they may be appraiſed.

By two ſworn Appraiſers.

Concerning the Overplus.

As to Corn and Hay. *And whereas no Sheaves or Cocks of Corn looſe, or in the Straw, or Hay, in any Barn*

Barn or Granary, or in any Hovel, Stach or Rick, can by the Law be diſtrained, or otherwiſe ſecured for Rent, whereby Landlords are oftentimes cozened and deceived by their Tenants, who ſell their Corn, Grain and Hay, to Strangers, and remove the ſame from the Premiſſes chargeable with ſuch Rent, and thereby avoid the Payment of the ſame.

A Remedy. *Be it further enacted by the Authority aforeſaid, that for remedying the ſaid Practice and Deceit, it ſhall and may, from and after the ſaid Firſt Day of* June, *be lawful to and for any Perſon or Perſons having Rent arrear, and due upon any ſuch Demiſe, Leaſe or Contract as aforeſaid, to ſeize and ſecure any Sheaves or Cocks of Corn, or Corn looſe, or in the Straw, or Hay, lying or being in any Barn or Granary, or upon any Hovel, Stack or Rick, or otherwiſe, upon any Part of the Land or Ground charged with ſuch Rent, and to lock up or detain the ſame in the Place where the ſame ſhall be found, for and in the Nature of a Diſtreſs until the ſame ſhall be replevied upon ſuch Security to be given as aforeſaid; and in Default of replevying the ſame as aforeſaid, within the Term aforeſaid, to ſell the ſame after ſuch Appraiſement thereof to be made, ſo as nevertheleſs ſuch Corn, Grain or Hay, ſo diſtrained,*

How Corn and Hay may be ſeized and ſecured where found.

As a Diſtreſs till replevied.

ed, as aforesaid, be not rewoved by the Person or Persons distraining, to the Damage of the Owner thereof, out of the Place where the same shall be found and seised, but be kept there (as impounded) until the same shall be replevied or sold, in Default of replevying the same within the Time aforesaid.

Not to be removed till replevied or sold.

In case of Pound-Breach or Rescous.

The Party shall recover treble Damages and Costs.

And be it further enacted by the Authority aforesaid, That upon Pound-Breach or Rescous of Goods or Chattels distrained for Rent, the Person or Persons grieved thereby, shall in a special Action upon the Case, for the Wrong thereby sustained, recover his and their treble Damages and Costs of Suit against the Offender or Offenders in any such Rescous or Pound-Breach, any or either of them, or against the Owner of the Goods distrained, in case the same be afterwards found to have come to his Use or Possession.

If Goods be distrained and sold where no Rent is due.

Provided always, and be it further enacted, that in Case any such Distress and Sale as aforesaid, shall be made by Virtue or Colour of this present Act for Rent, pretended to be arrear and due, where in Truth no Rent is arrear or due to the Person or Persons distraining, or to him or them in whose Name or Names, or Right, such Distress shall be taken as aforesaid, that then the Owner of such

Goods and Chattels diſtrained and ſold as aforeſaid, his Executors or Adminiſtrators, ſhall and may by Action of Treſpaſs, or upon the Caſe, to be brought againſt the Perſon or Perſons ſo diſtraining, any or either of them, his or their Executors or Adminiſtrators, recover double the Value of the Goods or Chattels ſo diſtrained and ſold together with full Coſts of Suit.

The Owner ſhall recover double Value and full Coſts.

An Oath to be Adminiſtred to the Appraiſers of the Goods, &c.

YOU ſhall well and truly, according to the beſt of your Underſtanding, appraiſe the Goods and Chattels of H. R. *diſtrained on for Rent by* O. P. *of which Goods and Chattels you ſhall have good Sight and Conſideration.*

So help you G O D.

Upon this Act ſome have made theſe Obſervations, *viz.* by the latter Clauſe of this Act it ſeems, That if Goods be diſtrained upon Pretence for Rent where none is due, yet no Action lies by this Act unleſs they were alſo ſold as well as diſtrained;

Obſervations.

ſtrained; ſo that the Party muſt not in this Caſe replevy his Goods, if he intend to take the Benefit of this Act.

But he may replevy them, or let them lie, and have the Benefit of the former Law.

Corn, &c. So the Party diſtraining Corn and Hay, and keeping it upon the Place under Pretence of Rent, is liable as formerly to an Action and Damages, if he cannot juſtifie that Rent was then due; and if he can, he may detain them there, till replevied or ſold, by Virtue of this Act.

Tender of Rent, &c. And yet it ſeems, that after Appraiſment of the Corn or Hay, and Tender of the Money, and reaſonable Charges by ſome Perſon willing to buy the ſame; he may not detain the Corn or Hay longer in the Barn, Granary, Hovel, *&c.* for this would be great Prejudice to the Owner, if the Party diſtraining may ſell them, after Appraiſment, when and to whom he will. *Sed quære.*

Removed when. The Words are, *Be not removed to the Damage of the Owner* thereof. This might have been enough, if the Party diſtraining had Right, he is bound to take Care of Damage,

But

But it ſeems the Corn and Hay muſt not be removed; for the following Words are,

But be kept there (as impounded) until the ſame ſhall be replevied or ſold within the Time aforeſaid; that is, after the Appraiſment. And it is the Party diſtraining that ſhall and may cauſe them to be appraiſed, after five Days Notice: But *quære*, when or how ſoon after? See the following Act.

By an Act made *Anno octavo Annæ Reginæ*, for the better Security of Rents, and to prevent Frauds committed by Tenants,

IT is enacted, That from and after the First Day of May, 1710. *No Goods or Chattels whatſoever lying or being in or upon any Meſſuage, Lands or Tenements, which are or ſhall be leaſed for Life or Lives, Term of Years, at Will, or otherwiſe, ſhall be liable to be taken by Virtue of any Execution on any Pretence whatſoever, unleſs the Party, at whoſe Suit the ſaid Execution is ſued out, ſhall before the Removal of ſuch Goods from off the ſaid Premiſſes, by Virtue of ſuch Exe-*

Rent to be paid before Goods ſhall be taken in Execution.

cution or Extent, pay to the Landlord of the said Premisses, or his Bailiff, all such Sum or Sums of Money as are or shall be due for Rent of the said Premisses at the Time of the Taking such Goods or Chattels by Virtue of such Execution,

Not to exceed one Year's Rent.

Provided the said Arrears of Rent do not amount to more than one Year's Rent; and in case the said Arrears shall exceed one Year's Rent, then the said Party, at whose Suit such Exception is sued out, paying the said Landlord or his Bailiff one Year's Rent, may proceed to execute his Judgment, as he might have done before the making of this Act: And the Sheriff or other Officer is hereby impowered and required to levy and pay to the Plaintiff, as well the Money so paid for Rent, as the Execution-Money.

Distress upon a fraudulent Removal of Goods.

And that in case any Lessee for Life or Lives, Term of Years, at Will, or otherwise, of any Messuages, Lands or Tenements, upon the Demise whereof any Rents are or shall be reserved or made payable, shall from and after the first Day of May fraudulently or clandestinely, convey or carry off from such demised Premisses his Goods or Chattels, with Intent to prevent the Landlord or Lessor from distraining the same for Arrears of such Rent so reserved as aforesaid: It shall and may be lawful to and for such Lessor or Land-

Landlord, or any Perſon or Perſons by him for that Purpoſe lawfully impowered, within the Space of five Days next enſuing ſuch conveying away, or carrying off ſuch Goods or Chattels as aforeſaid, to take and ſeize ſuch Goods and Chattels where-ever the ſame ſhall be found, as a Diſtreſs for the ſaid Arrears of ſuch Rent; and the ſame to ſell or otherwiſe diſpoſe of in ſuch Manner, as if the ſaid Goods and Chattels had actually been diſtrained by ſuch Leſſor or Landlord, in and upon ſuch demiſed Premiſſes, for ſuch Arrears of Rent; any Law, Cuſtom, or Uſage to the contrary in any wiſe notwithſtanding.

Exception of Sale Bona fide

Provided nevertheleſs, That nothing in this Act contained ſhall extend or be conſtrued to extend, to impower ſuch Leſſor or Landlord to take or ſeize any Goods or Chattels as a Diſtreſs for Arrears of Rent, which ſhall be ſold Bonâ fide, *and for a valuable Conſideration, before ſuch Seizure made.*

Actions not gainſt Tenants for Life, &c.

And that whereas no Action of Debt lay againſt a Tenant for Life or Lives, for any Arrears of Rent during the Continuance of ſuch Eſtate, 'tis enacted, that it ſhall and may be lawful for any Perſon or Perſons having Rent in Arrear, or due upon any Leaſe or Demiſe for Life or Lives, to bring an Action of Debt for ſuch Arrears of Rent, in the ſame Man-

ner as they might have done in case such Rent were due and reserved upon a Lease for Years.

Distresses how liable to Sale.

And that all Distresses to be made as aforesaid, shall be liable to such Sales, and in such Manner, and the Monies arising by such Sales to be distributed in like Manner, as by an Act made in the Second Year of the Reign of their late Majesties King William and Queen Mary, (intituled, An Act for enabling the Sale of Goods distrained for Rent, in Case the Rent be not paid in reasonable Time,) is in that Behalf directed and appointed.

Remedy against Tenants holding over their Leases.

And that whereas Tenants Pur auter vie (that is, for Life of another Person) and Lessees for Years, or at Will, frequently hold over the Tenements to them demised, after the Determination of such Leases. And whereas after the Determination of such or any other Leases, no Distress can by Law be made for any Arrears of Rent, that grew due on such respective Leases before the Determination thereof; 'tis enacted, That it shall and may be lawful for any Person or Persons, having any Rent in Arrear, or due upon any Lease for Life or Lives, or for Years, or at Will, ended or determined, to distrain for such Arrears after the Determination of the said respective Leases, in the same

ſame Manner as they might have done, if ſuch Leaſe or Leaſes had not been ended or determined.

Provided that ſuch Diſtreſs be made within the Space of ſix Calendar Months after the Determination of ſuch Leaſe, and during the Continuance of ſuch Landlord's Title or Intereſt, and during the Poſſeſſion of the Tenant from whom ſuch Arrears became due. *At what Time.*

But that nothing in this Act contained ſhall extend, or be conſtrued to extend, to hinder or prejudice her Majeſty, her Heirs or Succeſſors, in the levying, recovering or ſeizing any Debts, Fines, Penalties or Forfeitures, that are or ſhall be due, payable or anſwerable to her Majeſty, her Heirs or Succeſſors, but that it ſhall and may be lawful for her Majeſty; her Heirs and Succeſſors; to levy, recover and ſeize ſuch Debts, Fines, Penalties and Forfeitures, in the ſame Manner as if this Act had never been made. *Saving to her Majeſty, &c.*

Note, By an Act of Parliament made at *Oxford*, in the Seventeenth Year of King *Charles* the Second, it is enacted, That whenſoever any Plaintiff in Replevin ſhall be nonſuit before the Iſſue joined in any Suit of Replevin, by Plaint or Writ lawfully returned, removed, or de- 17 Car. 2. cap. 7. *Plaintiff nonſuited.*

pending in any of the King's Courts at *Westminster*; That the Defendant making a Suggestion in Nature of an Avowry or Cognizance for such Rent, to ascertain the Court of such Cause of Distress; then the Court upon his Prayer shall award a Writ to the Sheriff of the County where the Distress was taken, to enquire by the Oaths of twelve good and lawful Men of his Bailiwick, touching the Sum in arrear at the Time of such Distress taken, and the Value of the Goods or Cattle distrained; and upon fifteen Days Notice given to the Plaintiff or his Attorney in Court, of the sitting of such Inquiry, the Sheriff may enquire of the Truth of such Matters contained in the Writ, by the Oaths of twelve Men, *&c.* And upon Return of the Inquisition, the Defendant (that is, he that distrained) shall have Judgment to recover against the Plaintiff the Arrearages of such Rent, in Case the Goods or Cattle distrained shall amount unto that Value; and in Case they shall not amount unto that Value, then so much as the Value of the said Goods and Cattle shall amount unto, together with his full Costs of

Suggestion.

Writ of Inquiry to the Sheriff.

Notice.

Value.

of Suit, and ſhall have Execution thereupon by *Fieri facias*, or *Elegit*, or otherwiſe, as the Law ſhall require. And in caſe ſuch Plaintiff ſhall be nonſuit after Cognizance or Avowry made, or Iſſue joined, or if the Verdict ſhall be given againſt ſuch Plaintiff, then the Jurors that are impanelled or returned, to enquire of ſuch Iſſue, ſhall at the Prayer of the Defendant enquire concerning the Sum of the Arrearages, and the Value of the Goods or Cattle diſtrained: And thereupon the Avowant, or he that makes a Conuſance, ſhall have Judgment for ſuch Arrearages, or ſo much thereof as the Goods and Cattle amount unto, together with his full Coſts, and ſhall have Execution of the ſame as aforeſaid.

Verdict againſt the Plaintiff, &c.

And if the Judgment in any of the Courts aforeſaid be given upon Demurrer for the Avowant, or him that maketh Conuſance for any Rent, the Court ſhall, at the Prayer of the Defendant, award a Writ to enquire of the Value of ſuch Diſtreſs; and upon the Return thereof, Judgment ſhall be given for the Avowant, or him that makes Conuſance as aforeſaid, for the Ar-

Judgment upon a Demurrer.

rears alledged to be behind in such Avowry or Conusance, if the Goods or Cattle so distrained shall amount to that Value; and in Case they shall not amount to that Value, then for so much as they amount unto, together with his full Costs of Suit, and have Execution thereof as aforesaid.

Second Distress for the Residue

And in all Cases aforesaid, where the Distress is not of the Value of the Rent Arrear, there the Party to whom these Arrearages are due, his Executors or Administrators, may from Time to Time distrain again for the Residue of the said Arrears, which formerly a Man could not do, for he might not distrain twice for one Rent; for it was accounted his Folly, that he took not a sufficient Distress at first. But now by the Statute, That and several other Advantages are taken away from the Tenant.

4 & 5 Ann.

By the late Act, for the Amendment of the Law, 4 & 5 *Annæ*, It is lawful for any Defendant or Tenant in any Action or Suit, or for any Plaintiff in Replevin in any Court of Record, with the Leave of the same Court, to plead as many several Matters thereto as he

he ſhall think neceſſary for his Defence.

Provided, That if any ſuch Matter ſhall, upon a Demurrer join'd, be judged inſufficient, Coſts ſhall be given at the Diſcretion of the Court. Or if a Verdict ſhall be found upon any Iſſue in the ſaid Cauſe for the Plaintiff or Defendant, Coſts ſhall alſo be given in like Manner; unleſs the Judge who tried the ſaid Iſſue ſhall certifie, That the ſaid Defendant or Tenant, or Plaintiff in Replevin, had a probable Cauſe to plead ſuch Matter, which upon the ſaid Iſſue ſhall be found againſt him. See more of *Replevin* in the next Chapter. *Coſts given.*

CHAP. V.

Of Reſcous, in what Caſes it may be lawful: Of Replevins, how they may be ſued out; and of Avowries to Declarations upon Replevins.

Reſcous, what.

THE Word or Term *Reſcous* is derived from an old *Norman* Verb *Reſcourer*, which is in the *Latin Recuperare*, that is, to take from, to get again, or recover: So that *Reſcue* is as much as to ſay, to recover or get again what another hath taken away. *Coke* 1 *par. Inſt.* 160.

And in the Senſe of the Law, *Reſcous* is Taking away and Setting again at Liberty Goods diſtrained, or the Body of a Perſon arreſted, and in an Officer's Cuſtody by Virtue of legal Proceſs.

Of Diſtreſſes.

Such Kinds of *Reſcous* as appertain unto our preſent Subject, are of Diſtreſſes taken: and we are therein to conſider, in what Caſes it may be juſtifiable to *reſcue* Goods or Cattle diſtrained, and where not.

If

If a Landlord diſtrain when there is no Rent due, the Tenant may make a *Reſcue*, and hinder that Diſtreſs. *Co. L.* 4 *f.* 11. *When lawful.*

In like manner if a Landlord come to diſtrain, and the Tenant tender his Rent unto him, and the Lord will diſtrain notwithſtanding; in this Caſe the Tenant may make *Reſcous*, 1 *Inſt. f.* 160.

If Rent be in Arrear, and the Lord diſtrain the Tenant's Cattle in the Highway within his Fee; here alſo the Tenant may *reſcue* them, for no Man may diſtrain in the Highway but the King and his Officers by ſpecial Authority. *Coke, Ibid. Magna Charta, f.* 25. *In Highway.*

In like Manner, if a Landlord diſtrain *Averia Carucæ*, Goods of the Plough, where there is a ſufficient Diſtreſs to be taken beſides; or if the Lord diſtrain any Thing that is not diſtrainable by Common Law or Statute: In this Caſe, it is lawful for the Tenant to make *Reſcue*. *Ibid. f.* 112. *Raſtal* Tit. *Diſtreſs* 10. Averia Carucæ.

But if a Lord come to diſtrain Cattle which he ſeeth within his Fee, and the Tenant or any others to prevent the Diſtreſs drive the Cattle away out of the Fee; the

Freſh Suit. Lord may follow them with freſh Suit, and diſtrain the Cattle, and the Tenant cannot juſtify a *Reſcous* of them, becauſe in the Judgment of the Law the Diſtreſs is taken within his Fee. *Hugh's Grand Abr.* 1 *part. p.* 217. *C.* 21.

Reſcue juſtifiable. But if the Lord be coming to diſtrain, and have not Sight of the Cattle within his Fee, though the Tenant drive them off on Purpoſe, or if the Cattle after the View go out of the Fee of their own Accord, or if the Tenant after the View removeth them for any other Cauſe than to prevent the Diſtreſs; then if the Lord diſtrain them out of his Fee, the Tenant may juſtify a *Reſcue. Co.* 3 *par. Inſt. fol.* 161.

If the Lord diſtrain out of his Fee in Lands not holden of him, the Tenant may make *Reſcous*, unleſs in the Caſes aforeſaid. *Co. Lit.* 161. a.

Reſcous returned. If *Reſcous* be returned without ſhewing the Place where *Reſcous* was made, it is void. *Mo. Rep.* 112. *pl.* 562.

Damage feſant. If a Man come to diſtrain Cattle *Damage feſant*, and ſee the Beaſts in his Ground, and the Owner of the Cattle drives them out before the Diſtreſs taken; the Owner of the Ground

Ground cannot follow and take them, for if he do, the Owner of the Cattle may reſcue them, for they muſt be *Damage feſant*; that is, doing Hurt at the Time of the Diſtreſs taken, and the Owner of the Ground may bring his Action of Treſpaſs. *Coke, Ibid.*

The Lord cannot break open any Gate that is locked, nor break open any Incloſure to take a Diſtreſs: So that if a Tenant lock up his Gates, and incloſe his Ground, ſo that the Lord cannot come to diſtrain, if the Rent be behind, and the Lord have had actual Poſſeſſion, this is a Diſſeiſin. *Coke, Ibid.* But ſee the late Acts. *Diſſeiſin.*

For the Eaſe and ſpeedy Remedy of the Country, in Caſe of Diſtreſſes where the Cattle be pounded, the Statute hath provided, That every Sheriff at his own County-day, or within two Months after he firſt receives his Patent, is to depute and proclaim in his Shire-Town four Deputies to make Replevins within his County, which muſt reſide within twelve Miles one of another, on Pain of five pounds a Month for every Month they are wanting. *Replevin.* *Sheriff's Deputies.*

So

So that when any Man's Goods are diſtrained or impounded, he may repair to one of theſe Sheriff's Deputies for that Purpoſe; and there he may have a Replevin (upon *Plegii de Retorn. habendum ſi*, &c.) to cauſe the Goods diſtrained to be delivered to the Owner.

Replegiari There is likewiſe a Writ *De Replegiari facias* at the Common Law, whereby the Sheriff is commanded, taking Pledges of Proſecution, to redeliver the Goods diſtrained to the Owner: But ſince the other is the readier and eaſier Way, this Writ is out of Faſhion.

Tenant is Plaintiff. In a Replevin, he whoſe Goods are diſtrained or impounded becomes the Plaintiff, and declares againſt the other for unjuſtly taking and detaining his Goods or Cattle *contra vad. & pleg.* &c.

Withernam. If a Landlord diſtrain, and carry the Diſtreſs to Hold, or out of the County, ſo that the Sheriff upon a *Riplevin* cannot re deliver the Goods, then upon the Sheriff's Return of the *Replevin*, Tenants may have a Writ of *Withernam* directed to the Sheriff, to take as many of the Lord's Beaſts, or as much Goods in his keeping, till he have made Deliverance of the

firſt

first Distress; and if the Goods or Cattle be conveyed to a Fort or Castle, the Sheriff may command the Power of the County, and beat it down. *Rastal*, Tit. *Distress*, 7.

If a Distress be made in a Franchise or Bailiwick, the Sheriff is to direct his Replevin to the Bailiff thereof to deliver them upon Pledges, *&c.* *Franchise.*

And if he make no Answer, or return that he will make no Deliverance, or the like, then the Sheriff may enter into the Liberty and make Deliverance; and if the Distress was taken without the Liberty, and impounded within the Liberty, then the Sheriff may enter and make Deliverance, and need not first to make a Warrant to the Bailiff of the Liberty. *Stat. Marbl. c.* 21. *Westm.* 1 *c.* 17. 2 *Co. Inst.* 140, 194. *Sheriff may enter.*

The Plaintiff in the Replevin ought to have the Property of the Goods in him at the Time of the Distress made; for if the Defendant claim Property, the Sheriff cannot replevy the Distress, but the Property must be tried by Writ. *Property.*

So that if the Defendant claim Property in the Goods distrained, then must the Plaintiff in the Replevin

Proprietate probanda.

vin have a Writ *De Proprietate probanda*, directed to the Sheriff to try the Property; and if the Jury find for the Plaintiff, then the Plaintiff must make Deliverance of the Distress: And if it pass for the Defendant, the Sheriff can proceed no further, unless the Plaintiff bring a Writ of *Replegiari facias* directed to the Sheriff, and then though he do return the Property, yet it shall proceed to Trial in the Common Pleas upon the Issue of the Property. *Co.* 1 *par. Inst. f.* 145.

Two Kinds.

And 'tis noted, That there are two Kinds of Properties; that is, a general Property, which every absolute Owner hath; and a special Property, as of Goods pledged or taken to manure one's Land, and the like; and of both these a Replevin doth lie. *Co. Lit.* 145. b.

But a Man cannot claim Property by his Bailiff or Servant.

Recordare.

The Defendant in a Replevin, that is, he that made the Distress, may, if he see Cause, bring a Writ of *Recordare*, and so remove the Plaint upon the Replevin out of the Sheriff's County-Court into the Common Pleas; and if the Plaintiff declare not, he may have a *Retorn' habend'*. And then if

he declare not, a Writ to enquire of Damages. 2 *Co. Inſt.* 339.

And if a Replevin be depending by Writ out of Chancery, the Plaintiff or Defendant may remove the Plea by a *Pone*, and if the Plea be depending in the County, the Plaintiff may remove the ſame without Cauſe; but the Defendant cannot move the ſame without Cauſe, which muſt be inſerted in the End of the Writ. 2 *Co. Inſt.* 339. *Reg. Orig.* 84. *F. N. B.* 69. *Pone.*

If a Man by his Deed grant a Rent with a Clauſe of Diſtreſs, and grant further that he ſhall keep the Goods diſtrained againſt Sureties and Pledges till the Rent be paid; this Grant is not good, but the Sheriff may replevy the Goods diſtrain'd notwithſtanding: For if ſuch a Diſtreſs ſhould be irrepleviable, the Current of Replevins would be ſtopped, to the great Damage of the Subject. *Reſervation void.*

If the Goods or Cattle of ſeveral Men be diſtrain'd, they cannot join in a Replevin, but every Man muſt have a ſeveral Replevin: For in a Replevin it is a good Plea to ſay, the Property is to the Plaintiff and to a Stranger; and where there be two Plaintiffs, that the Property is to *Joinder.* *Property.*

to one of them. *Co. 1 par. Inſtit. f.* 145.

Driving Diſtreſs. If a Man take a Diſtreſs in one County, and drive it into another, the Owner of the Cattle may ſue a Replevin in which County he pleaſeth. *Comp. Att.* 131.

Dead Cattle, &c. In a Replevin, if it be of two Cattle, one living, the other dead, the living ſhall be firſt demanded. *Finch l.* 1. *c.* 3. *p.* 25.

If the Cattle of a *Feme Sole* be taken, and afterwards ſhe taketh a Husband, now he alone may ſue a Replevin. *Ibid.*

Declaration. If the Plaintiff in Replevin do not ſet out the Place where the Diſtreſs is taken as well as the Town, his Declaration will be naught, and the Avowant may overthrow him upon a Demurrer. *Hob. Rep.* 16. *int' Read* and *Hawkes.*

If a Lord diſtrain his Tenant wrongfully, although the Cattle be come back again to the Owner; yet the Tenant may have a Replevin againſt the Lord, becauſe he cannot have an Action of Treſpaſs againſt him.

Caution. The Plaintiff in a Replevin ought to be careful in giving his Inſtructions for it, for it muſt be certain in ſetting

ſetting down the Number and Kinds of the Cattle which are diſtrained, otherwiſe the Replevin is not good.

Avowry.

The *Avowant* is the Defendant in a Replevin; that is, he that made the Diſtreſs; and when he juſtifies in his Plea for what Cauſe he diſtrained, that Plea is called his *Avowry*.

In his own Right.

As if a Landlord diſtrains for Rent in Arrear, and the Tenant or Owner of the Cattle brings a Replevin, and declares againſt him for unjuſtly taking and detaining his Cattle, and the Defendant juſtifies he took it in his own Right, and ſo ſhewing the Cauſe of his Taking in his Plea: This is an *Avowry*.

Conuſance as Bailiff.

But if the Defendant took the Diſtreſs for or in the Right of another, then when he hath ſhewed the Cauſe in his Plea, he muſt make *Conuſance* or Acknowledgment of the Taking the Diſtreſs, as being Bailiff or Servant unto him in whoſe Right he took it.

What Avowries.

There are four Manners of Avowries which a Lord may make upon a Replevin:

1. Avowry upon his very Tenant. *Co. Lit. 9. f. 135, 136.*

2. Upon

2. Upon his very Tenant by the Manor where the Tenant had but a particular Eſtate.

3. Upon his Tenant by the Manor where the Lord had but a particular Eſtate; and theſe three are Avowries at the Common Law.

21 H. 8. c. 19.

4. The Lord may avow upon the Matter in the Land as within his Fee: This is provided by Stat. 21 *H.* 8. *c.* 19. and is the ſafeſt Way for the Benefit of the Lords; for by this Statute the Lord may avow the Taking a Diſtreſs, as in Lands holden of him within his Fee, without naming of any Perſon in certain; which by the Common Law they could not do, but were thereby compel'd to avow upon a Perſon in certain, which often proved much to their Damage and Prejudice: For by the ſecret Fines, Recoveries, Grants, and Conveyances, which the Tenants uſed purpoſely to frame to defraud their Lords, they were ignorant upon whom to make their legal Avowry; which Inconveniences the fore-mentioned Statute hath prevented.

Plaintiff's Advantage. Vide antea.

Now in an Avowry upon this Statute, the Plaintiff in the Replevin, be he Tenant for Years or otherwiſe, may

may have every ſufficient Anſwer and Aid, and every other Advantage in the Law to the Avowry, Diſclaims only excepted; for becauſe the Avowry is made upon no certain Perſon, he cannot diſclaim.

Coſts and Damages for the Defendant.

And if ſuch Plaintiffs be non-ſuit or barred, or overthrown by the Avowry, then the Defendant or Avowant ſhall recover Coſts and Damages againſt the Plaintiff, as the Plaintiff ſhould have done, if he had recovered in the Replevin againſt the Avowant.

If any Avowry is made for Rent, and it appears by the Party's own Shewing that Part of it is not yet due, yet the Avowry may be good for the Reſidue. 1 *Saund.* 385.

But if it appears, that an Avowant has Title only to two Parts of the Rent, for which he avows, the whole Avowry ſhall abate. *Idem* 286.

Nomine Pœne.

Alſo in an Avowry for Rent, and *Nomine Pœne* together, without alledging any Demand of Rent, the Avowry is good for the Rent, altho' it is ill for the Penalty. *Ibid.*

Bar.

Avowry for Rent due at a later Day, is not a Bar in Avowry for Rent due at a former Day; neither is a Recovery in Debt for Rent due a

a later

a later Day, a Bar in Debt for Rent due at a former Day, as an Acquittance is. 1 *Lev.* 43.

Plea. In Replevin, the Defendant pleaded they were the Beasts of a Stranger: Whereupon the Plaintiff demurred, because 'twas only a Plea in Abatement. The Court said, It was good either in Bar or Abatement, and that there needed no Avowry for a Return, because the Beasts being not the Plaintiff's, the Avowant is to have the Return; and Judgment was given for the Defendant. 2 *Lev.* 92. See before, Stat. 17 *Car.* 2. at the End of *Ch.* 4.

Arrearages lost. If a Tenant hath Rent behind for divers Years, and makes a Feoffment in Fee, and the Lord accept the Rent or Service of the Feoffee due in his Time, he shall lose the Arrearages of his Rent due in the Time of the Feoffor: For after such Acceptance, the Lord cannot avow upon the Feoffor, nor upon the Feoffee, for the Arrearages due in the Time of the Feoffor; but if the Feoffor dieth, although the Lord accept the Rent or Service by the Hands of the Feoffee due in his Time, yet he shall not lose the Arrearages, because he is now by the Law compelled to avow

avow upon the Feoffee; and what the Law enjoins him to, ſhall not be prejudicial unto him.

If the Plaintiff in a Replevin be nonſuit, or otherwiſe by Avowry barred or overthrown; then the Defendant or Avowant ſhall recover Coſts and Damages againſt the Plaintiff, as the Plaintiff ſhould have done or had, if he had recovered in the Replevin againſt the Avowant. See before, *Ch.* 4. *Nonſuit, &c.*

For the Learning of Avowries, See *D'Anvers's General Abridgment*, Tit. *Avowry*, *f.* 644, 645, *&c.*

CHAP.

CHAP. VI.

In what Caſes a Tenant or other ſhall be ſaid to commit Waſte in Houſes, Gardens, Woods, Paſtures, Orchards, &c. *and what Waſte ſhall be puniſhable, and what not.*

Caution againſt Waſte.

IT concerns every Tenant, of what Nature ſoever his Tenure be, to be very careful herein; for he may in committing Waſte ſoon become obnoxious to the Law, and incur great Damage.

I ſhall therefore by Way of Caution ſhew you in what Caſes a Tenant may commit Waſte, ſo as to render himſelf liable to Loſs and Puniſhment; and then how far a Tenant may act upon his own Tenure, and not commit any puniſhable Waſte.

Waſte, how.

If a Tenant for Life or Years, or in Dower, do pull down any of the Houſes or Tenements, or ſuffer them to be uncovered, to the Rotting or Deſtroying of the Timber or Ma-

Materials of the Houſe, this is Waſte. *Co.* 1 *par. Inſt. f.* 53.

So likewiſe if Glaſs-Windows be broken down or carried away, it is Waſte, though the Tenant glazed them himſelf, for the Glaſs is Part of the Houſe. It is alſo Waſte to take away Wainſcot, if it be fixed to the Walls or Poſts of the Houſe. *Glaſs Windows.*

It is likewiſe Waſte to take away Doors or Windows, or any Thing annexed or fixed to the Freehold, although the Tenant fixed them there himſelf. *Doors.*

If a Tenant build a new Houſe where none was before, it is Waſte: And if he ſuffer it to be waſted, it is a new Waſte. *Building.*

The Pulling down of a Stone-Wall or Mud-Wall of an Houſe, is Waſte. *Coke, Ibid.* *Walls.*

If a Tenant of a Park, Warren, Dove-Houſe, or the like, do not leave ſuch ſufficient Stores as he found when he entred, it is Waſte; and ſo it is to ſuffer a Park-Pale to decay, whereby the Deer are loſt or diſperſed. *Parks &c.*

If the Tenant ſuffer the Houſe to be waſted, and then fell Timber to repair them, this is a double Waſte. *Co.* 1. *par. Inſt.* 53. *Felling Timber.*

Timber, Waſte &c. Waſte is properly in Houſes, Gardens and Timber-Trees; that is, Oak, Aſh and Elm, which are counted Timber generally in all Places; except in ſome Copyholds Elm is not.

Now theſe Timber-Trees are ſaid to be waſted, either by cutting them down, lopping or topping them, or any otherwiſe decaying the Timber.

And in ſome Countries where Timber is ſcarce: Beech is accounted Timber, or other Trees uſed for building Houſes; and there the Cutting of them is Waſte. *Idem.*

Or if a Tenant ſuffer the young Germins of Trees to be deſtroyed, this is Deſtruction, and puniſhable in Waſte.

Willows, Birch, &c. To cut down any Trees, as Willows, Birch or the like, which ſtand and grow in the Defence and within View of the Dwelling-Houſe, is Waſte.

Hazels. It is a Waſte to cut down Hazels which grow not under the great Trees, but in a Quarter of the Wood by themſelves.

If a Tenant grub up or deſtroy a quick Fence of White Thorn, it is Waſte. *Co. 2 par. Inſt. f. 53.*

Burn-

Burning of an Houſe by Negligence or Miſchance was Waſte. But is ſince made otherwiſe; yet if it happen through the Negligence of a Servant, ſuch Servant forfeits 100 *l.* or to be ſent to the Work-Houſe for Eighteen Months. See at the later End of this Treatiſe. *Houſe-burning.*

Where is a Wood, and nothing growing there but Underwood, the Tenant cannot cut all: But if it be a Wood where great Trees grow amongſt the Underwood, there he may cut all the Underwood. *Woods.*

It is Waſte to cut Apple-trees, if they bear Fruit, though they lie along the Ground. *Fruit-Trees, &c.*

It is alſo Waſte to cut Damſin-Trees, or any Fruit-Trees growing in a Garden or Orchard.

To dig for Gravel, Chalk, Clay, Brick, Earth or Stones, or the like, is Waſte; and ſo it is if a Tenant dig for any Mines which were not open at the Time of the Leaſe made. *Digging.*

To ſuffer a Bank or Wall of the Sea to be in Decay, ſo that by the Flux and Reflux of the Sea the Marſh is overflown, ſo that it become unprofitable, is Waſte. *Sea Banks &c.*

But if the Sea break in ſuddenly by a violent Tempeſt, it is no Waſte.

It is Waſte alſo if a Tenant ſuffer the Banks of any River or Water to decay, whereby the Ground is ſurrounded, or becomes unprofitable; ſo it is to ſuffer Paſture-Ground to be ſurrounded ſo as it become ruſhy, or Arable-Land, ſo that it becomes tough Clay.

Arable. It is Waſte for any Tenant to convert Arable into Wood, or Meadow into arable.

Puniſhment. The Puniſhment in Waſte is treble Damages, and Forfeiture of the Place waſted.

There is Voluntary or Actual Waſte, and Permiſſive Waſte.

How the Action lies. An Action of Waſte lieth againſt a Tenant by the Courteſy, Tenant for Life or Years, Half a Year, or Tenant in Dower, by him that hath the Eſtate of Inheritance, in any of all theſe Caſes before-mentioned.

Guardian. But Waſte doth not lie againſt a Guardian in Socage, but an Action of Account or Treſpaſs.

Elegit. Neither doth Waſte lie againſt a Tenant by *Elegit*, Statute-Merchant or the Staple; but an Action of Account after the Debt and Damages levied.

Waſte

Waſte doth not lie againſt a Tenant at Will: But if ſuch Tenant voluntarily pull down Houſes, or cut down Timber-Trees, or the like; in this Caſe the Lord may have an Action of Treſpaſs againſt him. *Co.* 1 *par. Inſt.* 54 *At Will.*

But againſt a Tenant in Mortgage, either an Action of Waſte or an Account will lie againſt him, becauſe his Eſtate is conditional. *Noy's Max. p.* 33. *Mortgagee.*

If two or more Joint-Tenants or Tenants in Common, be in a Houſe, and one will repair the Houſe, and the other will not; in that Caſe, he that will repair it, may have a Writ *de Reparatione facienda.* *Joint Tenants.*

If a Landlord covenant to repair the Houſe, and doth it not, in this Caſe the Leſſee may cut Timber growing upon the Ground and repair it, though he be not compellable thereunto, and ſhall not be puniſhable in Waſte for ſo doing. *Repairs.*

No Man can have an Action of Waſte, unleſs he have the immediate Eſtate of Inheritance; but ſometimes another ſhall join with him. *Coke,* 1 *par. Inſt. p.* 53. *Action by whom.*

As if a Reverſion be granted to Two, and the Heirs of the One, *Joinder.*

they two ſhall join in an Action of Waſte.

In like Manner the ſurviving *Copartners*, and the Tenant by the Courteſy ſhall join in an Action of Waſte.

If a Tenant for Years commit Waſte and die, no Action of Waſte lieth againſt his Executors or Adminiſtrators, for Waſte done before their Time.

Copartners. If there be two *Copartners* of a Reverſion, and one of them dies, the Aunt and Niece ſhall join in an Action of Waſte. *Kitch. f.* 244.

Surrender. If a Tenant for Life commit Waſte, and after ſurrender his Eſtate, and the Leſſor accepts it; the Leſſee is diſcharged of the Waſte.

Stranger. If a Stranger commits Waſte upon the Lands which one holdeth for Life or Years, the Tenant ſhall ſuffer for it, and is left to take his Remedy over, againſt him that did it.

Delivery of Timber. If a Landlord covenant to deliver Timber out of the ſame Land to repair the Houſe let, and will not deliver it, and for Defect thereof the Tenant will not repair it, but ſuffers the Houſe to fall down; this is Waſte in the Tenant, and he is puniſhable for it.

But

But if the Timber be to be taken out of the Lands, and be not delivered, then the Tenant is excuſable if he ſuffers the Houſe to fall, and no Action of Waſte lies againſt him.

If a ſingle Woman rent Lands and marries, and her Husband commits Waſte and dies, ſhe ſhall be puniſhed for this Waſte done by her Husband. *Idem.* *By Husband.*

But if a Leaſe be made to a Man and his Wife, and her Husband commits Waſte and dies; in this Caſe, the Wife ſhall not be puniſhed for ſuch Waſte, unleſs ſhe agree to the Eſtate.

If a Woman be Tenant for her Life, and marries, and her Husband commit Waſte, and the Wife dieth, the Man is not puniſhable for this Waſte: But if a Woman be poſſeſſed of a Term of Years, and takes a Huſband, who commits Waſte, and the Wife dies; here the Man is liable to an Action of Waſte, for the Waſte by him committed, becauſe he enjoyeth the Term of the Leaſe. *Coke,* 1 *par. Inſt.* 54. *Simile.*

If a Man make a Leaſe for Life or Years, and after grants the Reverſion for Years, the Leſſor ſhall have no Action of Waſte during the Years; *Reverſion granted.*

for he himſelf hath granted away the Reverſion, in Reſpect whereof he is to maintain his Action.

Leaſe determined. If an Action of Waſte be brought and the Term end while it is depending, yet the Writ ſhall not abate: For although the Plaintiff cannot recover the Place waſted, yet he ſhall recover the treble Damages.

Ceſtui que vie. Likewiſe if one be Tenant for Term of another's Life, and makes Waſte, and afterwards the *Ceſtui que vie* dies, here the Leſſor ſhall recover treble Damages, but cannot recover the Place waſted; for that falls to him by the Death of the *Ceſtui que vie*. *Co.* 1 *par. Inſt. f.* 285.

What recovered. If Waſte be done in one Corner of a Wood, that Place only which is waſted ſhall be recovered: But if it be done here and there about the Wood, then the whole Wood ſhall be recovered, or as much wherein the Waſte *ſparſim* is done. *Co.* 1 *Inſt.* 54.

And ſo in Houſes, ſo many Rooms ſhall be recovered wherein there is Waſte done.

Hedge-rows. If a Man make Waſte in cutting Trees which grow in Hedge-rows, which incloſe Paſtures, nothing ſhall be recovered but the Place waſted; that

that is, the Circuit of the Roots, and not the whole Paſture; but if Trees grow ſcatteringly about the Paſture, then the whole Paſture is forfeited if they be cut. *Pract. Reg.* 654.

Pleas. It is a good Plea in Bar to a Writ of Waſte, to ſay that the Houſe fell by a ſudden Tempeſt, although the Tenant did covenant to repair it; but it is no Plea in an Action of Covenant.

It is alſo a good Plea in a Writ of Waſte, to ſay, that the Houſe was ruinous at the Time of the Leaſe making, and the Timber ſo putrified and rotten that it fell.

It is alſo a good Plea, to ſay, that the Plaintiff had entred upon the Land, before which Entry no Waſte was made; or that he ſurrendred, and the Plaintiff did accept, before which Time no Waſte was made.

Surrender. If a Tenant doth waſte, and afterwards ſurrender, and the Leſſor agrees; yet the Leſſor may have an Action of Waſte, and recover treble Damages. *Co.* 1 *par. Inſt. f.* 285.

Abatement. If an Action of Waſte be brought by Husband and Wife in Remainder in Special Tail, and the Wife dieth (the Suit depending) without Iſſue; in this Caſe the Writ of Waſte ſhall abate.

Without Impeachment. If a Leaſe be made to hold to one without any Impeachment of Waſte, the Leſſee may cut down Trees, and convert them to his own Uſe: But if the Words be, to hold without Impeachment of any Action of Waſte; in this Caſe, if the Leſſee cut down Trees, the Leſſor may have them. *Idem f.* 220.

Rent-Charge. If a Tenant for Life grant a Rent-Charge, and after doth waſte, and the Leſſor recover in an Action of Waſte, he ſhall hold the Land charged during the Life of the Tenant for Life; but if the Rent were granted after the Waſte done, the Leſſor ſhall then avoid the Grant made by the Leſſee for Life. *Coke*, 1 *par. Inſt.* 223, 224.

Releaſes. If a Tenant in Fee releaſe to his Tenant for Life all his Right, yet he ſhall have an Action of Waſte. *Idem f.* 345.

And if a Tenant in Tail make a Leaſe for his own Life, yet he ſhall have an Action of Waſte.

But if there be a Tenant for Life, the Remainder to another in Tail, and he in the Remainder releaſe to the Tenant for Life all his Right and State in the Land; he cannot afterwards have an Action of Waſte.

If

If the Grantee of a Reverſion bring an Action of Waſte, the Leſſee may plead generally, that he hath nothing in the Reverſion. *Pleas.*

If a Leſſee before his Term begin, enters into the Lands let to him, and do an Act which amounteth unto Waſte, the Leſſor ſhall not have an Action of Waſte for the ſame. *Leſſee.*

None ſhall have Judgment to recover in an Action of Waſte, where the Waſte comes but to 12 *d.* or ſuch a ſmall Sum

If Waſte be done upon Lands let for Term of Years or Life, by one againſt whom the Leſſee can have no Remedy in Law for committing the ſame Waſte, the Leſſee in ſuch Caſe is not puniſhable for the ſame by the Leſſor, except there be a Special Covenant in the Leaſe, that he ſhall not permit nor ſuffer Waſte to be done. *Coke*, 1 *par. Inſt. f.* 303. *Leſſee.*

If the Houſe be uncovered when the Tenant cometh in, it is no Waſte in the Tenant if he ſuffer it to fall down.

The Riſing of a new Frame of a Houſe which was never covered, is no Waſte. If a Houſe fall by ſudden Tempeſt, or be burnt by Lightning, or deſtroy'd by Enemies, or the like, without any Default of the Tenant, *Sudden Tempeſt.*

or

or was ruinous at his Coming in, and fall down; this is no Waſte.

Re-building by Tenants. And the Tenant may build the ſame again with ſuch Materials as remain, and with other Timber growing upon the Ground; but he muſt not make the Houſe any larger than it was, for if he do, it is Waſte.

Furnace. If a Tenant fix a Furnace, and not to the Walls nor Poſts of the Houſe, if he take it away within his Term, it is no Waſte.

If a Tenant in Fee fix a Furnace in the Middle of the Houſe, the Heir ſhall have it, and not the Executors.

If a Houſe fall by a great Wind or Tempeſt, the Leſſor ſhall have the Timber, for it is no Waſte, and the Leſſee is not bound to build it up again.

Relief in *Chancery* for Waſte. *Vide antea.*

Digging Land. Digging of Land by a particular Tenant is Waſte. *Dyer*, 361. *Lit. Rep.* 295.

But not if it be for bettering the Ground: Yet if a Copyholder build a new Houſe upon Part of the Land, it has been adjudged a Forfeiture; for though the Land is bettered, yet it is in another Kind. *Id.* & 22 *H.* 6.

A Leſ-

A Leſſee of Land made it a Hop-ground, and it was adjudged Waſte. *Lit. Rep. Ibid.* Altho' one Acre now was better than three before; but it was in another Kind. *Hop-ground.*

To pull down an Houſe is Waſte; but if the Tenant build it up again before an Action brought, he may plead that ſpecially. 1 *Mod. Rep.* 94. *Plea.*

To pull down a Malt-Mill, and build a Corn-Mill, it's Waſte. *Idem. Co. Lit.* 53. 1 *Rol.* 507. 3 *Rol.* 815.

If a Houſe could not be repaired without pulling it down, it muſt be pleaded ſpecially. 1 *Mod. Rep.* 94. *Special Plea.*

Waſte in the Houſe is Waſte in the Curtilage, and Waſte in the Hall is Waſte in the whole Houſe. *Idem.* *What Waſte.*

To convert a Brewhouſe into Tenements is Waſte alſo, altho' they be of greater Value. 1 *Lev.* 309.

As is obſerved before, if a Tenant make Waſte in cutting of Wood or Timber contrary to the Proviſoes, Exceptions or Covenants in his Leaſe; for ſuch a Breach the Landlord may bring his Action or Covenant before the End of the Term. *Action, when.*

Now Waſte is a Forfeiture, but if a Copyholder by Cuſtom hath been fined, or removed it, that proves that 'tis no Forfeiture; for where the Law gives *Forfeiture.*

gives the Lord another Recompence, the Lord will not make a Forfeiture: And the Lord may purſue a Copyholder with Amerciaments till he pluck up a Hedge. *Lit. Rep.* 267.

Some Obſervations concerning the Cutting, Spoiling and Stealing of Wood.

43 El. c. 7. *Cutting, Stealing or Spoiling of Woods, &c.*

By the Stat. 43 *El. c.* 7. If any ſhall be convicted by his own Confeſſion, or by the Teſtimony of one Witneſs upon Oath, before one Juſtice of Peace or Head Officer, to have unlawfully cut or taken away any Grain growing, robbed any Orchard or Garden, digged up or taken any Fruit-Trees, broken any Hedges, Pales or other Fences, cut or ſpoiled any Woods or Under-Woods ſtanding and growing, or the like, or to have been Acceſſary thereunto; he ſhall, within ſuch Time as the Juſtices or Head Officer ſhall appoint, pay for the firſt Offence to the Party grieved ſo much as the Juſtice or Head Officer ſhall ſet down: And in Caſe the Party offending be not able to pay it, or do it not according to Order, then the Offender is by them or either of them (reſpectively) to be committed to the Conſtable or other Officer of the

the Place where the Offence was committed, or the Party apprehended, to be whipp'd; and ſo for every Offence afterwards, and proved as aforeſaid, the Offender is to have the like Puniſhment of Whipping.

If the Conſtable refuſe or neglect to whip the Offender, any ſuch Juſtice of the Peace or Head Officer may commit him to Priſon without Bail, till he whip or cauſe to be whipped the Party offending, as above declared.

No Juſtice may execute this Statute for Offences done to himſelf, unleſs he be aſſociated with one or more Juſtices of Peace, whom the Offence does not concern. *Vide* the Statute 43 *Eliz. c.* 7. To which the Statute 15 *Car.* 2. *cap.* 2. has added the following Proviſions, *viz.*

Every Conſtable, Headborough, or other Perſon in every County, City, Town Corporate, or other Place where they ſhall be Officers or Inhabitants, ſhall have Power to apprehend, or cauſe to be apprehended ſuch as they ſuſpect for having or carrying, or any Ways conveying, any Burden or Bundles of any Kind of Wood, Underwood, Poles, or young Trees, Bark or Maſt of Trees, or any Gates, *By Stat.* 15 Car. 2. c. 2.

Gates, Stiles, Posts, Pales, Rails or Hedge-wood, Broom or Furze.

If any Person be suspected to have any such Woods, Underwoods, *&c.* any Officer, by Warrant under the Hand and Seal of one Justice, may enter by Virtue thereof into the Houses, Out-Houses, Yards, Gardens, or other Places belonging to such Persons, and whereſoever they find any such, they may apprehend those Persons, and also those who are suspected to have cut and taken the same, and carry them before a Justice of the Peace of the County, City, *&c.* and if he in whose Custody such Wood, *&c.* is found, cannot give a satisfactory Answer and Proof to the Justice of his buying the same, he shall be deemed a Convict within the Statute 43 *Eliz.* The Forfeiture for the first Offence as the Justice shall appoint, not exceeding Ten Shillings, and Commitment to the House of Correction, or Whipping, for not performing the Justices Order; for the second Offence, House of Correction and hard Labour for one Month; for the third, to be deemed an incorrigible Rogue.

Forfeiture.

Buyers of such stolen Wood may be ordered to pay treble Value to the

the Owner, *&c.* to be levied by Diſtreſs and Sale; and for want of ſuch Diſtreſs, Commitment to Goal without Bail for a Month, where he is to remain at his own Charges.

Note, No Perſon is to be puniſhed by this Statute, that hath been puniſhed by any former Law for the ſame Offence; nor is any Perſon to be queſtioned for any Offence within this Statute, unleſs within ſix Weeks after the Offence committed.

Note alſo, By a late Stat. 1 *Geo. c.* 48. If any Perſons ſhall maliciouſly cut or ſpoil any Timber-Trees, Fruit-Trees or other Trees, the Party damaged thereby ſhall have Satisfaction from the Inhabitants of the Pariſh, and the ſame is to be viewed, and Damages and Coſts to be recovered as in Caſes of Hedges and Dykes overthrown in the Night by the Stat. 12 *E.* 1. And any two Juſtices where the Offence was, or the Seſſions may on Complaint of any Inhabitant or the Owner, cauſe the Offender to be apprehended, and finally determine the Offences, and commit the Offender to Correction and hard Labour for three Months *Sans* Bail, and to be publickly whipp'd once a Month.

And if any ſhall maliciouſly ſet on Fire any Wood or Underwood or Coppice, he ſhall ſuffer as a Felon by the ſaid Statute.

CHAP. VII.

The Doctrine concerning Common of Cattle, &c. between Landlord and Tenant.

Common, what. Common ſignifieth, in our Common Law, that Soil or Water, whereof the Uſe is common to this or that Town or Lordſhip; as Common of Paſture, (termed *Communia Paſturæ.*) *Bract. l.* 4. *c.* 19 & 40.

Piſcariæ. Common of Fiſhing, *Communia Piſcariæ. Id. l.* 2. *c.* 34.

Turbariæ. Common of Turbary for digging of Turves, *Communia Turbariæ. Id. l.* 4. *c.* 41.

Eſtoveriorum. Common of Eſtovers, *Communia Eſtoveriorum. Kitch. f.* 94. See *Eſtovers in Tabula.*

Diviſion into three. Again, Common is divided into, 1. Common in Groſs; 2. Common Appendant, and Common Appurtenant; 3. Common by Reaſon of Vicinage or Neighbourhood. *Vide Co. Lit.* 121. a.

1. *Common in Groſs.* Now Common in Groſs is a Liberty to have Common alone, (that is, without any Land or Tenement in

in another Man's Land) to himself for Life, or to him and his Heirs, and it is commonly passed by Deed of Grant or Specialty. *Old Nat. Brev.* 31 & 37. *Cowel's Interp. verb.* Common.

2. *Common Appendant and Common Appurtenant.*

Mr. *Cowel* further says, That Common Appendant and Common Appurtenant are in a Manner confounded, as appears by *Fitz. Nat. Brev. f.* 180. and are defined to be a Liberty of Common appertaining to, or depending of such and such a Freehold; yet *Kitchin, fol.* 94. seems to make this Difference, That he which hath Common Appurtenant, hath it without Limitation of this or that Kind of Beasts; but that this again is controlled by *Dyer, f.* 70. b. *Numb.* 19. And that he who hath Common Appendant, hath it but for Beasts commonable, as Horses, Oxen, Kine and Sheep, being accounted fittest for the Ploughman, and not of Goats, Geese and Hogs. Whereupon the Author of the *New Terms of the Law* addeth another Difference, which is, That Common Appurtenant may be severed from the Land whereunto 'tis appurtenant, but not Common appendant.

Difference into Common Appurtenant,

And Common Appendant.

Another Difference.

Original of Common Appendant

The Original of Common Appendant is expreſſed in 4 *Lil.* Co. *Rep. f.* 34. to this Purpoſe: *Viz.* That when a Lord enfeoffed another in arable Lands to hold of him in Socage, as all Tenure in the Beginning (according to *Littleton*) was; The Feoffee, to maintain the Service of his Plough, had Common in the Waſte of his Lord for his neceſſary Beaſts to gain and compoſt his Land, and that for two Cauſes: One, for that (as then it was taken) it was tacitly implied in the Feoffment, by Reaſon the Feoffee could not gain or compoſt his Land without Cattle, and Cattle could not be ſuſtained without Paſture, and ſo by Conſequence the Feoffee had, as a Thing neceſſary and incident, Common in the Waſtes and Land of the Lord. The ſecond Reaſon was, for Maintenance and Advancement of Tillage, which is much regarded and favoured in the Law.

Two Cauſes.

3. Common for Cauſe of Vicinage.

Common for Cauſe of Vicinage or Neighbourhood, is a Liberty that the Tenants of one Lord in one Town have to common with the Tenants of another Lord in another Town: Which Kind of Common they that challenge may not put their

their Cattle into the Common of the other Town, for then they are diſtrainable; but turning them into their own Fields, if they ſtray into their Neighbour's Common, they muſt be ſuffered. See the *Terms of the Law*, and *Cow. Interp. verb.* Common.

Where either incloſe.

That if there be Common by Reaſon of Vicinage between two Manors Time out of Mind, *&c.* yet one may incloſe againſt the other. *Co. Lit.* 122. 4 *Co.* 38. b. So it's ſaid, if he incloſes any Part of his Common, the Common *pur Cauſe de Vicinage* is gone. But in ſuch a Caſe, if the Lord of one Manor incloſes, he ſhall not bind a Copyholder of the ſame Manor, but that he may have Common for Cauſe of Vicinage as he had before. *Mic.* 3 *Jac. in Banco, per Hobert.*

Privilege of a Copyholder.

The Cattle ought to eſcape therein, &c.

Where there is Common for Cauſe of Vicinage between two, yet one cannot put his Cattle into the Land of the other, but they ought to eſcape there of themſelves by Reaſon of the Vicinity, for this is but an Excuſe of the Treſpaſs. *Co. Lit.* 122.

Whether a Preſcription ought to be Cauſa Vicinagii.

It was ſaid, That every Common for Cauſe of Vicinage, is a Common Appendant, and that a Man for ſuch Reaſon need not preſcribe; but

but that it is sufficient to say, That he and all those whose Estate, &c. have used to intercommon *Causa Vicinagii*; but yet it's doubtful, and 13 *H.* 7. 13. b. there is a Prescription for Common *Causa Vicinagii*. And in *Poph.* 201. *dubitatur*, whether it was sufficient that he and all the Occupiers of &c. have had, &c.

Resolved *per Cur.*

Where one of the Commons hath but 50 Acres, and the other 100.

That if there be Common for Cause of Vicinage between the Towns of *A.* and *B.* and *A.* hath fifty Acres of Common, and *B.* hath an Hundred Acres of Common, the Inhabitants of *A.* cannot put more Cattle into their Common than the fifty Acres will depasture, without any Regard to the Common of *B.* for the Original Cause of this Common was not the Profit of either Town, but to prevent Suits in open Countries for reciprocal Escapes from one Field into the other. 7 *Co.* 5. b.

Shack.

As for *Shack* in the County of *Norfolk* (which is a Sort of Common for Cause of Vicinage) and the Commencement thereof, *vide* 7 *Co.* 5.

Before we see farther into Common Appendant, &c. it will be convenient to inquire after the Common of the Lord.

For

For Common as Lord.

The Lord of the Manor ſeiſed of the Waſtes in which the Tenants have Common, may, it's ſaid, feed the Common by Part or all, of common Right without Diſturbance, 18 *E.* 3. 43. 18 *Aſſ.* 4. But whether the Lord by Preſcription may be reſtrained to a certain Number, *vide* 2 *Roll. Abr.* 267. *Pla.* 2. *For Common as Lord.*

If the Owner of the Soil grants to another Common without Number there, yet the Grantee cannot uſe the Common with ſo many Cattle, that the Grantor ſhall not have ſufficient Common for his Cattle, 12 *H.* 8. 2. *Bridgm.* 5. 1 *Roll. Rep.* 365. 1 *Saund.* 345. *Co. Lit.* 122. a. 1 *Roll. Abr.* 399. *Pl.* 5. *Upon a Grant ſans Number.*

So where a Man claims Common without Number by Preſcription or Cuſtom, for it is againſt the Nature of the Word *Common* to exclude the Owner of the Soil, and it was implied in the firſt Grant, That the Owner of the Soil ſhould take his reaſonable *Profit* there. *Co. Lit.* 122. 2 *Roll. Abr.* 265. Letter *L.* *Upon Claim by Preſcription.*

And tho' *per F. N. B.* 125. *D.* Common without Number is not admeaſurable; *Where Lord may diſtrain.*

ſurable; yet if the Commoner ſurcharges it, the Lord may diſtrain. *Vide* 1 *Saund.* 345.

May agiſt Cattle. The Lord by Preſcription may agiſt the Cattle of a Stranger in the Common; but without Preſcription he cannot. 30 *E.* 3 27.

May licenſe a Stranger. He may licenſe a Stranger to put in his Cattle, if he leaves ſufficient Common for the Commoners. 2 *Mod.* 6, 7. 275.

May not defeat his own Grant. And if *A.* grants Common to *B.* in a certain Place, *A.* cannot afterwards erect a Rick there; for by the Grant the Cattle of *B.* are to range over the whole Place without Reſtraint, and it ſhall not be in the Power of *A.* to defeat his own Grant. *Cro. Jac.* 271, 272. *int' Farmer & Hunt. Vide Yelv.* 201, 202.

If he alien in Fee. If the Lord alien in Fee the Soil where the Common is to be taken,

Saving, &c. ſaving his Power of Feeding as Lord, he ſhall have Common there as Lord. 18 *E.* 3. 34.

If he alien without a Saving, &c. And if the Lord, without any Saving, aliens the Soil where the Common is to be taken, his Common as Lord is gone by the Feoffment; but the Alienee of the Soil may feed it as the Lord might have done before:

For

For that this Common is given, because it is in his Soil where the Lord has it, and not because he is Lord. *Ibid.*

Of Common Appendant.

That Common Appendant is of Common Right. 26 *H.* 4.

That 'tis not Common Appendant, unleſs it has been Appendant Time out of Mind. 40 *Ed.* 3. 10. b. *Keilw.* 129. b. *Bro. Com.* 16. 5 *Aſſ.* 2. For ſuch Common cannot be created at this Day. 5 *Aſſ.* 9. *Fitz. Aſſize* 134. 26 *H.* 8. 4. *Appendant Time out of Mind.*

That Common Appendant may be through all the Year, ſaving a certain Time, at what Time the Lord feeds it. 27 *E.* 3. 86. b. *All the Year ſaving, &c.*

Alſo it ſeems, that Common Appendant may be limited upon Condition. 37 *H.* 6. 34. *Fitz. Treſp.* 85. *Br. Common* 13. *Limited upon Condition.*

That Common Appendant may be unlimited; ſo *quam diu* he pays ſo much; ſo *tam diu* as he ſhall be living upon ſuch a Houſe to which the Common is Appendant. *Ibid. ut ſupra.* *Unlimited, &c.* *So tam diu, &c.*

After Corn ſevered, till, &c. So Common Appendant may be to common after the Corn is ſevered 'till it is re-ſowed, 37 *H.* 6. 34. And if Part only is re-ſowed, he may common in the Reſidue. *Yelv.* 185. 2 *Brownl.* 189. *Br. Common* 13.

After Hay carried, till, &c. So it may be to common in the Meadow after the Hay carried, 'till *Candlemas.* 17 *Eliz.* 3. 26. b. 34.

So it may be to common in the Paſture from the Feaſt of St. *Auguſtin to All Saints*, &c. *Ibid.*

For two Years after, &c. Until, &c. So it may be to common two Years after the Corn cut and carried away, 'till it is reſowed, and every third Year *per totum Annum.* 22 *Aſſ.* 42. *Vide* 1 *Saund.* 343, 344.

In two Places. That a Man may have Common Appendant for thirty Cattle in one Place, and to the ſame Land, Common Appellant alſo in another Place for Part of the ſaid Cattle, and ſo may take it where he pleaſes. 17 *Ed.* 3. 34. b.

Until Land re-ſowed by Conſent. That a Man may preſcribe for Common in certain Lands from the Time the Corn is ſevered, until the Land ſhall be ſowed again by the Aſſent of the Commoners; for by the Law the Owner cannot plough where another hath Common. 1 *Leon.* 73. *int'* *Hawks* and *Molineux.*

So

So a Man may preſcribe for Paſturage for two Geldings in a thouſand Acres of Meadow, from the firſt Day of *May*, till the Graſs be there cut and made into Hay; for being in ſo great Quantity of Land, the Going of two Geldings there cannot ſo defoul or debruiſe it, but that Hay may well be made thereof. *Cro. Jac.* 37. *int'* Sir *John Thomas* and *Laſſels.* *For two Geldings in 1000 Acres.*

It ought to be Appendant to arable Land, but not to other Land which is not arable, nor to a Houſe: Neither can it be Appendant to Land which is approved within Time of Memory out of the Waſte of the Lord: Neither can Common of Turbary be Appendant to Land. 26 *H.* 8. 44. 5 *Aſſ.* 2. 9. *Br. Com.* 13. 16. *Fitz. Aſſize* 134. *To what it may be Appendant.*

Alſo it ought to be for ſuch Cattle as plough his Land (to which it is Appendant as it ſeems) and compeſter it, *viz.* Horſes and Oxen to plough the Land, and Cows and Sheep to compeſter it. 37 *H.* 6. 34. *Br. Com.* 13. *Com. Lit.* 122. *For what Cattle.*

But he may not uſe it with Goats, Geeſe, or ſuch like, for theſe are not neceſſary to do, *ut ſupra.* 37 *H.* 6. 34. *Br. Com.* 13. *What not.*

Not for all manner of Cattle.

And therefore a Preſcription to have Common Appendant for all manner of Cattle is not good, becauſe it comprehends, Goats, Geeſe, and ſuch like; but this is Common Appurtenant. 37 *H.* 6. 34. *Br. Com.* 13, 14. 1 *Roll. Abr.* 401. *pl.* 2.

Common admeaſurable.

Again, the Common is admeaſurable according to the Quality and Quantity of the Freehold, to which he claims to have this Common Appendant. 37 *H.* 6. 34. *Br. Com.* 13. *Vide poſtea* concerning Admeaſurement.

For how many Cattle.

Viz. For all thoſe which are Levant and Couchant upon the Land, 15 *Ed.* 4. 32. b. 11 *H.* 8. 12. *Br. Com.* 8. And *per Noy* 30. *dubitatur*, what Cattle ſhall be Levant and Couchant; but there ſaid, That the Chief Juſtice in the Circuit held for ſo many Cattle as the Land to which, *&c.* may maintain in the Winter, ſhall be ſaid Levant and Couchant. *Vide* 1 *Vent.* 54. And that ſo many Beaſts may be ſaid Levant and Couchant upon a Houſe as may be tied there, and are uſually to be maintained in the Houſe. 2 *Brownl.* 101. But *per Vaugh.* 253. in a common Intent, Cattle cannot be Levant upon a Meſſuage only.

Levant and Couchant.

What ſhall be ſaid Levant and Couchant.

That

That he who claims Common by Force of a Preſcription, as an Inhabitant of a Town, ſhall have no other Cattle to common there, but what are Levant and Couchant within the ſame Town. 15 *E.* 4. 32. b. *Br. Com.* 8. for there is no Diverſity between this and Common Appendant. See after. *By Inhabitant of a Town.*

That Common Appendant may by Uſage be limited to any certain Number of Cattle. 17 *E.* 3. 27. 34. b. *May be limited.*

Generally the Commoner cannot uſe the Common but with his own proper Cattle. 11 *H.* 6. 22. b. *Fitz. Com.* 3. *Br.* 47. 22. *Aſſ.* 84. *Br. Com.* 40. *Fitz. Aſſiſe* 228. *By whoſe Cattle.*

If the Commoner hath not any Cattle to manure the Land, he may borrow other Cattle to manure it, and may uſe the Common with them, for by the Loan they are in a manner made his own Cattle. 45 *E.* 3. 26. 11 *H.* 6. 22. b. 14 *H.* 6. 6. b. 22 *Aſſ.* 84. *Br. Com.* 5, 14, 406. *Br. Seiſin* 5. *Fitz. Com.* 3, 47. *Fitz. Treſ.* 33. *Fitz. Aſſ.* 228. *By borrowed Cattle.*

He cannot agiſt the Cattle of a Stranger. 11 *H.* 6. 22. a. 11 b. 22. *Aſſ.* 84. *Fitz. Com.* 3. *Br.* 40, 47. *Fitz. Aſſ.* 228. *May not agiſt, &c.*

Strangers Cattle taken to fold. If he takes the Cattle of a Stranger to fold, and folds them accordingly, being Levant and Couchant upon the Land, he may use the Common with these Cattle, for he has a special Property in them for the Time. *Mich.* 10 *Car. B. R. int' Jason* and *Hellyard, per Cur'.*

Grantable over. Where Common is grantable over or not. *Vide Roll. Abr.* 46. *pl.* 15, 16.

Upon Claim as an Inhabitant. If a Man as Inhabitant of a Town, claims Common for all manner of Cattle in a Place, and claims the Common by reason he is an Inhabitant there, he shall have no other Beasts to common there but those that are Levant and Couchant: And

Grant sans *Number.* if a Man grants *sans* Number, the Grantee cannot put in so many Cattle, but so that the Grantor may have sufficient Common in the same Land. 12 *H.* 8. 2. 15 *E.* 4. 32. b.

By reason of a Man's Person. That a Man may prescribe to have Common for all manner of Cattle by reason of his Person. 15 *E.* 4. 33. *Br. Com.* 8. *Vid.* 1 *Roll* 366, 398. *Br. Com.* 48.

Void, not saying Levant and Couchant. But if a Man claims Common by Prescription for all manner of commonable Cattle in the Land of another, as belonging to a Tenement, this it's said is a void Prescription, because he does not say it is for Cattle Levant

Levant and Couchant upon the Land to which he claims it to be Appurtenant, for a Man cannot have Common *ſans* Number Appurtenant to Land; and when he claims the Common for all Cattle commonable, and does not ſay for Cattle Levant and Couchant upon the Tenement, this ſhall be intended Common *ſans* Number, according to the Words; for there is not any Thing to limit it, when he does not ſay for Levant and Couchant; adjudged in Error, *int' Cobham* and *White*, *Mich.* 14. *Car. Rot.* 403, 404.

Upon Common ſans Number.

What ſhall be ſo intended.

Said to be nought upon a general Demurrer, but that is helped after Verdict. *Int' Cheadle* and *Miller*. *Vide* 1 *Lev.* 196. 1 *Saund.* 227, 346. 1 *Vent.* 164, 165. 1 *Mod.* 6, 7, 75. 3 *Mod.* 162. *Co. Ent.* 656. *Cro. Jac.* 44.

Helped after Verdict.

But if a Man preſcribes for Common for a certain Number of Cattle, as belonging to certain Land, he need not ſay Levant and Couchant. 2 *Mod.* 185. See the Diverſity adjudged, and 1 *Roll. Abr.* 401. *pl.* 4. 1 *Vent.* 163. 1 *Mod.* 75. *Cro. Jac.* 27.

Need not ſay Levant and Couchant.

It is doubted whether a Corporation may preſcribe, That every Burgeſs of the ſaid Corporation hath Time out of Mind had Common

In Groſs by a Corporation.

in Groſs *ſans* Number in a certain Place for all their Cattle, *int' Miller* and *Spateman.* 1 *Saund* 345, 346. And that the Chief Juſtice poſitively ſaid, There could be no Common in Groſs *ſans* Number. *Vide* 1 *Mod.* 6, 7. *dubitatur.*

Not ſans *Number.*

How the Preſcription ought to be.

But 2 *Jon.* 115. 2 *Lev.* 246. in an Action between the ſame Parties for a Diſturbance in the Uſage of the Common, it ſeems to have been adjudged a good Preſcription. *Vide Hard.* 111. Yet *vide Co. Lit.* 122. this is one of the Commons there enumerated: And 3 *Mod.* 290. *arguendo* admitted, but ſaid, The Preſcription muſt not be laid to be *ad libitum ſuum. Et vide March,* 83.

In a Fo'eſt.

Preſcription for Common *omni Tempore anni* in a Foreſt, *&c.* and it was not found to be a Foreſt. *Hard.* 87.

Pro omnibus Equis, *good for Geldings.*

If in a Bar to an Avowry for *Damage feaſant*, the Defendant preſcribes for the Common in the Place where *&c. pro omnibus Equis, &c.* and ſo juſtifies the putting in his Gelding there; this is a good Plea, for *Equus* is a general Name, and comprehends Geldings as well as Horſes, and Geldings in common Speech are called Horſes, but for Mares it is

is not ſo adjudged. *Cro. Eliz.* 798. *int' Stapleton* and *Morſe.*

Common claimed by the Name of Paſturage.

If in Bar of an Action of Treſpaſs the Defendant pleads, that he, and all thoſe whoſe Eſtate he hath in the Manor of *M.* have Time out of Mind had Paſturage for two Geldings in the Place where, and ſo juſtifies, this is a good Plea; for ſuch Common may be claimed by the Name of Paſturage; adjudged, *Cro. Eliz.* 27. *inter* Sir *John Thornhill* and *Laſſels.*

Preſcription for Common pro Magnis Averiis.

If a Man in Bar to an Avowry for *Damage feaſant* preſcribes, That he and all thoſe whoſe, *&c.* have had Common *pro Magnis Averiis* (for great Beaſts) in the Place where, *&c.* and ſo juſtifies his putting in the Geldings to uſe the Common; this is a good Plea: For *Magna Averia* may well be intended Horſes Oxen, Kine, or ſuch other Beaſts of theſe Kinds which are commonable, and by the common Phraſe of People are well known amongſt them, and there needs no Averment that the Gelding was one of the *Magna Averia*; adjudged, *Cro. Jac.* 508. *int' Standred* and *Shoreditch.*

Magna Averia, what.

But whether a Man may preſcribe for Common *pro Magnis Averiis*, viz. *pro Bidentibus*, &c. 1 *Saund.* 227. *dubitatur.* And the Chief Juſtice ſaid, Sheep were great Beaſts in reſpect of Conies, *&c.*

Sheep and Yearlings.

Vide 2 *Roll. Rep.* 173. where the Caſe of *Standred* is adjudged, and there ſaid, That all manner of Cattle, except Sheep and Yearlings, ſhould be called *Magna Averia.*

Common Appurtenant of Eſtovers.

If a Man hath Time out of Mind had Common of Eſtovers in a certain Place to be burnt in ſuch a Houſe, and to mend the old Houſes and old Hedges; this is not Common Appendant, but Appurtenant. 11 *H.* 6. 11. b.

As appurtenant to a Houſe.

And if a Man and his Anceſtors, and all thoſe whoſe Eſtate he hath in a Houſe, have had Common for two Beaſts in a certain Place; this alſo is not Appendant, but Appurtenant. 11 *H.* 6. 12.

Grant by Deed, how Appurtenant by Reference, &c. to an after Act.

Upon a Grant of Common by a Deed of Bargain and Sale of *Blackacre*, which Deed is afterwards inroll'd; this was held a good Common Appurtenant to *B.* although the Grantee had nothing in the Land at the Time of the Grant; and though it ſhall not relate to ſettle the Eſtate in

in him *ab initio*, inaſmuch as this has Reference to the Bargain and Sale, and to the Eſtate which he had by Force thereof. *Mich.* 15. *Jac.* B. R. *inter Gawen* and *Stacy*.

To an after Purchaſe.

And ſo it is where the Grant of Common had Reference to that which a Man ſhould afterwards purchaſe; for it is not neceſſary that he ſhould have the Land at the Time of the Grant. *Ibid.*

To the Inrolment of a Deed.

So if a Man bargains and ſells *Blackacre* to *B.* and after before the Deed is inroll'd, by another Deed grants a Common to the ſaid *B.* for all the Cattle which ſhould manure and eat the ſaid *Blackacre*, and after the Deed is inroll'd; this ſhall be a good Common Appurtenant to the ſaid *Blackacre*; and the Court ſaid it ſhould be ſo without any Help of Relation. *Int' eaſdem Partes ut ſupra.*

To a contingent Eſtate.

So where a Man grants to *B.* Common for all his Cattle which manure *Blackacre*, and after he purchaſes it; this was ſaid to be a good Common Appurtenant to this Acre upon a Contingent, though he had nothing in it at the Time, *&c. int' eaſdem Partes ut ſupra*; but here is made a *Quære*, inaſmuch as the Grant had no Reference to a future Purchaſe.

chaſe. *Vide* 1 *Roll. Abr.* 400. *pl.* 5, 6.

To Land in another Place.

H. ſeiſed in Fee of a Waſte called *W. Heath*, granted to the Prior of *S.* and his Tenants in *S.* Common in *W. præd'*, *Habend* to them and their Succeſſors as Tenants in Fee; and this was ſaid to be Common Appurtenant to the ſaid Land which the Prior had in *S.* aforeſaid, for that it could not be a Common *ſans* Number, but referred to the Land. *Inter Sacheverell* and *Porter*, 1 *Roll. Abr.* 400, *pl.* 7. *Cro. Car.* 482. 1 *Jones* 297. Adjudged upon a ſpecial Verdict.

Common in Groſs.

One granted to another a certain Aſſart with Common of Turbary, as belonged to two Hides of Land with the Appurtenances in *D.* and this was ſaid to be a Common in Groſs, being a Grant *de Novo*, not by Preſcription, and not Appurtenant to the ſaid Aſſart; adjudged, 5 *Aſſ.* 9. *Fitz. Aſſize* 134.

Grant de Novo.

Common extinguiſhed and revived.

If *A.* as Appurtenant to a certain Meſſuage, and twenty Acres of Land, hath Common in the Land of *B.* and after *B.* enfeoffs *A.* of the ſaid Lands, in which, *&c.* by which the Common is extinguiſhed; and after *A.* releaſes to *B.* the ſaid Meſſuage and twenty Acres of Lands, with all Com-

Commons, Profits and Commodities thereunto appertaining, or occupied, or uſed with the ſaid Meſſuage: This is ſaid to be good Grant of a New Common for the Time *Trin.* 39 *Eliz. int' Bradſhaw* and *Eyre. Cro. Eliz.* 570.

But becauſe it was not there averred, that this Common was therewith uſed at the Time of the Leaſe, it was adjudged againſt the Defendant who claimed the Common. *Averment of Uſer.*

So if a Copyhold Meſſuage eſcheats, to which before Common in the Demeſn of the Lord did belong, and the Lord by Deed grants it by the Name of a Meſſuage, *&c.* and of whatſoever Common to the ſaid Meſſuage belonging, *&c.* or with the ſame uſed. 2 *And.* 168. *Cro. Eliz.* 794. *So of a Copyhold that eſcheats.*

If a Man preſcribes to have Common of Eſtovers to his Freehold, *ſcil.* a Houſe, he cannot preſcribe to ſell the Wood, for this cannot be Appurtenant. 11 *H.* 6. 11. b. *Vide Noy* 145. but muſt ſhew they are to be burnt or ſpent in the Houſe. 1 *Sid.* 354. but he may preſcribe to build new Houſes. *Cro. Jac.* 25. *Wood not Appurtenant to ſell.*

But to burn, &c. So a Man may prescribe to have as much Turf yearly as two Men can dig in one Day. 1 *Lev.* 231.

Common Appurtenant to a Manor. A Man may prescribe to have Common Appurtenant to a Manor for all manner of Cattle. 14 *H.* 6. 6. b. and it is noted to be there said, Common Appendant, which cannot be *Vide* 1 *Roll. Abr.* 401. *Let. M. pl.* 2 *Fitz. Tres.* 33. *Br. Com.* 14.

So to a Freehold. So a Man may prescribe to have Common Appurtenant to his Freehold for all manner of Cattle. 20 *Ass.* 8. *Br. Com.* 41.

To a Fold-Course for 300 Sheep. A Man may prescribe that he and all those whose Estate he hath in the Manor of *D.* have used to have a Fold-Course, *scil.* a Common of Pasture for sheep not exceeding three hundred, in a Field, *scil. C.* Field, as Appurtenant to the said Manor; tho' he does not prescribe to have them Levant and Couchant upon the said Manor, there being a certain Number limited. *Mich.* 11 *Car. B. R. int' Day* and *Spooner. Vide ante* for how many Cattle. *Term. Mich.* 6. *Car. Rot.* 183.

Levant and Couchant.

For Hogs, Goats, &c. That a Man may prescribe to have Common Appurtenant for his Cattle not commonable; as Hogs, Goats, and such like. *Co. Lit.* 122.

That

That a Man may prescribe to have Common Appurtenant to his Freehold for all manner of Cattle, at every Season of the Year; adjudged, 25 *Ass.* 8. *Br. Com.* 41. *At every Season.*

That a Man may prescribe to have Common Appurtenant for Hogs Levant and Couchant upon such Land. &c. *Mich.* 5 *Jac. per Cur'.* *For Hogs Levant, &c.*

How Common Appurtenant may be used.

He that hath Common Appurtenant, cannot agist the Cattle of a Stranger. 13 *Ed.* 3. 37. *How he may not agist.*

But he may borrow Sheep of another to compester his Land, and with these he may use the Common. 14 *H.* 6. *Fitz. Tresp.* 33. *Br. Com.* 14. *May borrow Sheep.*

That a Man may use a Common Appurtenant to his Manor with Cattle that are for his Houshold. *Ibid.* *Vide* 1 *Roll. Abr.* 401. *Let. N. pl.* 2, 3. *Br. Com.* 14. *With what Cattle.*

But he cannot use the Common with Cattle that are to sell. *Ibid.* *What not.*

Of Common in Gross.

Common Appendant cannot be made Common in Gross, for this is for Cattle Levant upon the Land, to which *Not from Common Appendant.*

which, *&c.* and therefore it cannot be ſevered without Extinguiſhment.

No Severance. 9 *E.* 4. 39. 26 *Hen.* 8. 3. *Cro. Car.* 542. That it may not by Grant be ſevered from the Soil.

Not from Common Appurtenant. So Common Appurtenant for Cattle Levant and Couchant upon the Land, cannot be made in Groſs for the aforeſaid Cauſe. *Nevil* 384. 19 *H.* 6. 33. 6 *Br. Com.* 33. But that Common Appurtenant for a certain Number of Beaſts may be granted over. *Cro. Jac.* 14. *per Cur'* adjudged that it could not by Grant be ſevered from the Land, becauſe he had it only *ſub modo, viz.* for Beaſts Levant, *&c.*

May be granted over.

May in Groſs by a Grant over. If *A.* and all thoſe whoſe Eſtates he hath in the Manor of *D.* have had Time out of Mind a Fold-Courſe, *ſcil.* Common of Paſture, for any Number of Sheep not exceeding 300, in a certain Field, as Appurtenant to the ſaid Manor; he may grant over this Fold-Courſe to another, and ſo make it in Groſs, becauſe the Common is for a certain Number; and by the Preſcription, the Sheep are not to be Levant and Couchant upon the Manor: But it is a Common for ſo many Sheep Appurtenant to the Manor, which may be ſevered from

For a certain Number.

from a Manor as well as an Advowſon without any Prejudice to the Owner of the Land where the Common is to be taken. *Mich.* 11 *Car.* B. R. *int' Day* and *Spooner. Cro. Car.* 432. 1 *Jon.* 375. 1 *Roll. Abr.* 432. *pl.* 4. *intr' Mich.* 6 *Car. Rot.* 183. *Which may be ſevered.*

But there the Caſe was whether it might be granted over with Parcel of the Manor, and ſo ſhould be Appurtenant to this Parcel? And it is adjudged *in Banco*, that it ſhould paſs as Appurtenant to this Parcel, and ſo held *per Cur'* in *B. R.* *May be granted over with a Parcel.*

That a Man may preſcribe to have it for all manner of Cattle. 15 *E.* 4. 33. *For what Cattle.*

The Grantee of Common for a certain Number of Cattle, cannot common with the Cattle of a Stranger. 18 *E.* 4. 14. *b.* *Not of a Stranger.*

If a Lord licenſes a Stranger to put his Cattle into the Common, this ſhall be intended of commonable Cattle only, and not of Hogs. 2 *Mod.* 7. but if the Licence be for a particular Time, 'tis otherwiſe. *Ibid.* *Upon the Lord's Licence.*

If in an Action of Treſpaſs brought by a Commoner againſt a Stranger for putting his Cattle into the Common, whereby he could not have Common in ſo large a manner; and the

In pleading a Licence, muſt aver Sufficient left.

the Defendant pleads a Licence from the Lord to put his Cattle there, but does not aver there is ſufficient Common left for the Commoners. This is no good Plea; though it may be objected, the Plaintiff may reply thereunto, yet being the very Giſt of the Action, the Defendant ſhould have pleaded thereto: Adjudged *int' Smith* and *Feverel.* 2 *Mod.* 6.

Muſt ſhew the Surcharge.

But in an Action againſt the Lord, the Plaintiff muſt particularly ſhew the Surcharge.

By whoſe Cattle.

If a Commoner have no Cattle, he cannot agiſt the Cattle of others to uſe the Common. 45 *E.* 3. 25. *b* *Br. Com.* 5. *Br. Seiſin* 5. 22 *Aſſ.* 84. *Br. Com.* 40. *Fitz. Aſſ.* 228.

Not of Tenants at Will.

So he cannot command his Tenants at Will, to uſe it with their Cattle in his Name. *Ibid. ut ſupra.*

By borrowed Cattle.

But if he borrow other Cattle to manure his Land he may uſe the Common with them, for they are in a manner his Cattle by borrowing; and the Cattle which manure the Land, of Right ought to have Common. 45 *E.* 3. 25. *b.* 22 *Aſſ.* 84, *&c. ut ſupra.*

Appendant and not Groſs.

If a Man at all Times have uſed Common with his Cattle Couchant and Levant in certain Places, and not

not with other Cattle coming; this is Common Appendant to this Place, and not in Groſs. 22 *Aſſ.* 36. 13 *Co.* 66. *Br. Com.* 23.

If a Man grant Common to another for Years, and do not declare in what Place he ſhall have it, this is void. 9 *H.* 6. 36. *Br. Grant* 5. *What ſhall be a good Grant.*

If a Man grants to another Common *ubicunque Averia ſua ierint*; (whereſoever his Cattle went) this is a good Grant by Averment, in what Place his Cattle fed at that Time of the Grant, before or after. 9 *H.* 6. 36. *Br. Grant* 5. *Fitz. Com.* 2. *Br. Com.* 3. But without ſuch Averment, this is no good Grant. 9 *H.* 6. 36. *Ubicunq; Averia ſua ierint.* *Benefit by Averment.*

Again, if a Man make ſuch a Grant as above, yet if the Cattle of the Grantor did never feed in any Place before the Grant, or at the Time of the Grant or after, the Grantee ſhall have no Benefit of the Grant. *Ibid. Br. Com.* 5. *Where no Benefit by the Grant.*

But if he grants Common in that manner, and after he occupies and manures 100 Acres of Land with his Cattle, and after he becomes ſo poor that he hath no Cattle; yet the Grantee ſhall have the Common in the 100 Acres. *Ibid.* *Upon a future Occupation by the Grantor.*

So

So at or after the Grant, in any Place.

So upon such a Grant, if the Grantor at the Time of the Grant or after, feeds his Cattle in any Place, the Grantee may common there also. 9. *H.* 6. 36.

So Ubicunque Averia ierent.

So upon such a Grant of Common, *ubicunque Averia* of the Grantor *ierint*, if the Grantor put his Cattle in his Garden or in his Corn, the Grantee may put his Cattle there also. *Ibid.*

Quære, if the Grantor dies.

But if there be such a Grant, and the Grantor dies, 'tis made a *Quære*, If the Grantee shall have Common after his Death? *Ibid.*

Of Common throughout the Manor.

And if a Man grants Common to another for all his Cattle throughout his Manor, yet he cannnot common in the Garden of the Grantor's Parcel of the Manor, but only in such Places where a Man of common Right ought to common. *Ibid. Br. Com.*

How construed.

But upon such Grant he may common in any reasonable Part of the Manor, tho' not Waste or Common before; adjudged, *Cro. Car.* 599. For by the Grant there is no Restraint to the Waste or Commons.

Quandocunque Averia sua ierint.

Again, if a Man grant Common to another, *quandocunque Averia sua ierint*, (whensoever his Cattle should go), the Grantee shall not have Com-

Common, but when the Cattle of the Grantee are in the Common. 9 *H.* 6. 36. *Fitz. Com.* 2. *Br.* 3. *Br. Grant* 5. *Hob.* 40. cited and agreed. *Cro. Car.* 599. but objected, that the Clauſe, *Quandocunque*, &c. is void, becauſe it reſtrains all the Effect of the Grant. *Reſp. econtra*, for *Modus & Conventio*, &c. And it is not intendable, the Grantor will forbear to put in his own Cattle to defraud the Grantee of his Common. *Vide* 1 *Rep.* 87. *How intended*, &c.

If one grants Common to another in his hand, every Year that it lies freſh; this is good, though it be at my Will, whether he ſhall have any Profits, for I may ſow it. 17 *E.* 3. 34. *b.* *Where it may be at the Grantor's Will.*

And if *A.* grants Common to *B.* in certain Land for all his Cattle, which ſhall be Levant and Couchant upon *Black-Acre*, where *B.* hath nothing in *Black-Acre*, ſo that it cannot be appurtenant; yet this ſhall not be a Common in Groſs, becauſe the Intention and Limitation of the Grant is to Cattle Levant and Couchant. Agreed *int' Gawen* and *Stacy. Trin.* 15 *Jac.* B. R. *Where the Intention and Limitation muſt be obſerved.*

That

Upon a Grant in two several Places.

That a Man may grant to another, Common in one Place for all manner of Cattle, and in another Place for ten Beasts; and so the Grantee may put the ten Beasts in either of the two Places. 17 *E.* 3. 34. *b.*

Seisin of Common, how obtained, &c.

Not by a tortious User.

A *tortious User* of Common cannot put one in Seisin. 45 *E.* 3. 25. *b.* *Br Com* 5 *Br. Seisin* 5. 22 *Ass.* 84. *Br. Com.* 40. *Br. Seisin* 36. *Fitz. Ass.* 228.

Not by Tenants at Will.

As a Commoner cannot get Seisin by Cattle which he agists, for such User is not lawful; so he cannot gain Seisin by the User of his Tenants at Will being his Servants with their Cattle, by his Command, in his Name, for their User with their Cattle is tortious. *Ibid. ut supra.*

Seisin delivered by the Tertenant.

But if the Commoner hath no Cattle, and so takes the Cattle of another, and the Tertenant delivers Seisin to the Commoner, and is present when the Cattle are put in, and he assents to the User and Putting in, or commands him so to do; this is a good Seisin. 45 *E.* 6. 26, 22 *Ass.* 84. *Br. Seisin* 36.

So if the Commoner hath no Cattle, he may take Seisin by the Cattle of another, and chase them back presently; for the Continuance is tortious and this is said to be a good Seisin. 45 *E.* 3. 26. *Br. Seisin* 5. *Br. Com.* 5. But *Br. Com.* 51. 'tis made a *Quære*, and this seems not to be Law, for the putting them in without Continuance, is tortious. 22 *Ass.* 24 *Br. Com.* 40. *Br. Seisin* 36. *Fitz.* 228. *By the Cattle of another, how.* *Tortious.*

If a Man hath Common *sans* Number, if he hath been seised of this with Cattle, without any certain Number, as 20, 30 or 40, this is said to be a good Seisin. 11 *H.* 6. 23. *Upon Common sans Number.*

That if a Man recovers a Common, and the Sheriff upon a Writ of Seisin comes to the Place, and by Parol delivers to him Seisin of the Common; this is a good Seisin of the Common to have an Assise. 22 *Ass.* 84 *Bro. Seisin* 36. *Fitz. Assise* 228. *Delivered by the Sheriff by Parol.*

Where the Seisin of the Father is not sufficient for the Heir. 45 *E.* 3. 25. *Br. Seisin* 5. 22 *Ass.* 84. *Br. Seisin* 36. *Fitz. Assise* 228. *Upon Seisin of the Father.*

But the Seisin of Lessee for Years of a Common, is sufficient for him in Reversion. 45 *E.* 3. 26. 22 *Ass.* 84. *Fitz. Ass.* 228. *Br. Seisin* 36. *Upon Seisin of a Lessee for Years.*

What

What Things a Commoner may do.

General Learning thereof. For the Intereſt and Power of a Commoner, and the general Learning thereof; *vide Bridgm.* 10, 11. *Godb.* 123, 124. 2 *Leon.* 201, 202.

May make Gaps. Where he may make one or more Gaps to put in his Cattle, if the Common be encloſed. *Vide Goldſ.* 117. *Lit. Rep.* 38. 2 *Inſt.* 81.

Throw down Hedges. May throw down the Hedges. 2 *Mod.* 65, 66. 1 *Brown.* 228.

Let out Water. If the Lord makes a Pond in the Common, the Commoners may let the Water out. 1 *Brownl.* 288.

Upon the Lord's making Cony-Burrows. If the Lord of a Common makes Cony-Burrows in the Common, and ſtores them with Conies; though he has no Warren, yet the Commoners cannot juſtify the Killing the Conies, that they may not increaſe to the Prejudice of the Common. Adjudged *int' Hodſon and Griſſel, Mich.* 5 *Jac.* B. R. *Vide Godb.* 123, 124. 2 *Bulſt.* 116. *Yelv.* 105. *Cro. Eliz.* 876. *Cro. Jac.* 229, 230. 1 *Brownl.* 227. 2 *Leon* 201. 4 *Leon.* 7.

May not kill them

But may bring their Aſſize or Action. Again, if the Lord of a Common makes Cony-Burrows in the Common, and ſtores them with Conies, by which the Commoners cannot have

have ſufficient Common; yet the Commoners cannot juſtify the Killing the Conies, but ought to bring their Aſſiſe or Action againſt the Lord, for they cannot be their own Judges: *Sed dubitatur.* So *Bridgman* 9, 10, 11. *Dubitatur*, Whether a Commoner may preſcribe to kill the Conies, ſo often as the Common hath been oppreſſed. *Vide Cro. Jac.* 195. and *Yelv.* 104, 105. where the Caſe of not Killing is ſaid to be adjudged. So *Godb.* 123. *Cony*'s Caſe. So 2 *Leon.* 201, 202. and 4 *Leon.* 7. adjudged, though it ſhould be admitted the Commoner hath no other Remedy. *Cro. Jac.* 229, 230.

Dubitatur.

May not, though no other Remedy.

But it ſeems, every one of the Copyhold Commoners, by Preſcription in the Waſtes of the Lord, (if the Lord ſtores the Waſte with Conies) may have an Action of the Caſe againſt the Lord, averring that by this his Common is impaired. 1 *Roll. Abr.* 106. *Pl.* 19. 405. *Pl.* 2.

But Action againſt the Lord.

And that an Action lies, notwithſtanding the King grants to the Lord a Free Warren there. 8 *Jon.* 12. *Winch*, 16. *Palm.* 319. And accordingly, *Yelv.* 143. it was adjudged in an Action by the Heir of the Commoner, for the Continuance in his

Though the King granted him free Warren.

Time. *Vide Cro. Jac.* 195. *Yelv.* 104, 105, *&c. Sed vide* 1 *Lut.* 108.

May not dig and ſtop up the Holes.

Again it's ſaid, That if the Sheep of the Commoners are killed, by falling into the ſaid Cony-Burrows ſo made by the Lord; yet they cannot juſtify the Digging of the Land, and Stopping them for the Cauſe aforeſaid. *Trin.* 11 *Jac. B. R. ſed dubitatur.* 2 *Bulſt.* 115, 116. adjudged. *Cro. Jac.* 229, 230.

May not kill the Conies.

If *J. S.* hath Land adjoining to the Land of *J. D.* in which *J. N.* hath Common of Paſture, and *J. S.* makes Cony-Burrows in his Land, and ſtores them with Conies, which come into the Land of *J. D. J. N.* who hath the Common of Paſture, cannot there kill the Conies, becauſe he hath nothing to do there, but to take the Graſs with the Mouth of his Cattle. Adjudged, *Mich.* 43 & 44 *El. B. R. int' Bellowe & Loughdon. Vide* 1 *Roll. Abr.* 90. *pl.* 9. *Cro. El.* 876. The Action being brought by *J. D.* adjudged; for the Cony is a Beaſt of Warren, and profitable as Deer are, and not to be compared to Vermin. *Owen* 114. *Cro. Jac.* 195. *Yelv.* 105 2 *Bulſt.* 116. 1 *Lutw.* 108.

Cony a Beaſt of Warren.

Mich.

Mich. 10 *Car.* Adjudg'd *int' Eversby* and *Wilkinson, in B. R.* Such a Commoner brought an Action upon the Case against *J. S.* who, without any lawful Grant or Prescription, had stored the Land adjoining with Conies, by which the Conies came into the Land where he had Common, whereby he lost his Common; and adjudged that the Action does not lie, and a Judgment given *in Banco,* reversed accordingly in this Case in a Writ of Error; and the Court gave the Reason, because here the Commoner may kill the Conies. *Vide Cro. Car.* 387. 1 *Roll. Abr.* 90. *contra.* 1 *Jon.* 356. same Case adjudged, and the Judgment reversed accordingly.

See where it's said he may kill the Conies.

But cannot have an Action.

A Commoner may justify the Taking the Cattle of a Stranger *Damage fesant* upon the Common in his own Name, for the Interest which he has in the Common. 15 *H.* 7. 2 *b.* 11, 13. *b.* 14 *H.* 7. 3. *b.* 9 *Co. Mary's* Case, 112. *b. F. N. B.* 128. *c.* 10 *Ed.* 4. 4. 15 *H.* 7. 13. *b.* agreed.

Justification of taking Cattle Damage fesant.

But he can have no Action, unless laid, *per quod* his Common was impaired. *Kelw.* 47. *a.* But for this *vide* 2 *Co.* 112, 113. 1 *Brownl.* 197.

How he may lay an Action.

2 *Brownl.* 55. 1 *Roll.* 89. *pl.* 8. *Br. Com.* 35, 39. *Br. Juſtification*, 15.

Action by Commoner upon Digging Turf.

And if a Copyholder, by the Cuſtom of a Manor, has uſed to have Common for all his Cattle Levant and Couchant upon his Cuſtomary Tenement, in a certain Place, Parcel of the Manor, and a Stranger digs Turfs there, and carries them away, by which his Common is impaired; an Action upon the Caſe lies, declaring, That the Defendant dug ſo many Turfs there, and them with his Horſes and Carts (the Graſs then and there growing, treading down with his Feet in Walking) from the Place aforeſaid unjuſtly did take and carry away, whereby the Plaintiff could not have his Common for his Cattle in ſo beneficial a Manner as before he had; and this is ſaid to be a good Declaration. Though the Commoner cannot have any Damage for the Taking and Carrying away of the Turf; yet the Coming upon the Land with his Horſes and Carts to carry them, is a Prejudice to the Common. And there, *per quod* his Common is impaired, is the Cauſe of the Action, and the Carrying and Taking them is a Means of the Impairing thereof. *Mich.* 9 *Car.*

How he muſt declare in Caſe.

What is the Cauſe of ſuch Action.

inter

inter Teary & Godier, adjudged. This being moved in Arreſt of Judgment upon ſuch a Declaration, the Damages being intire. *Holland* and *Lovel* a like Point. 2 *Brownl.* 148. 9 *Co.* 113. *Co. Ent.* 9. *pl.* 8. 14. *pl.* 12. *Godb.* 343. 2 *Roll. Rep.* 308. *adjornatur.*

How he muſt declare upon Treſpaſs by a Stranger's Cattle.

That Treſpaſs lies againſt a Stranger, for ſuffering his Horſes, *&c.* to eat, *&c.* the Graſs, whereby he could not have his Common in ſo beneficial a Manner. 9 *Co.* 11. 2 *Brownl.* 55. *Jenk. Rep.* 144. By which Book, though the old Opinions are otherwiſe; yet an Action will lie, elſe the Commoner may be without Remedy; for the Cattle may be gone before he can take them *Damage feſant.* But he ſhall not have an Action for every Petit Treſpaſs; but for ſuch only, whereby he could not have his Common in ſuch a beneficial Manner. 9 *Co.* 113. 1 *Brownl.* 197. *Br. Com.* 24. *Keilw.* 47. 1 *Roll. Abr.* 405. *pl.* 5.

Not for every little Treſpaſs.

Where the Lord puts in his Cattle contrary to Cuſtom.

If there be a Cuſtom, that a Cloſe ought to lie freſh, and hained every ſecond Year till *Lady-day*, after the Corn cut and carried away, and *J. S.* hath uſed Time out of Mind to have Common in the ſaid Cloſe after *Lady-day*, till it is ſowed again

with Corn, for his Cattle Levant and Couchant upon a certain Tenement, as appurtenant thereto: In this Case, if the Lord of the Soil of the said Close puts in his Cattle in the said Close against the Custom, when it ought to lie fresh and hained; by the Custom, the said *J. S.* tho' he be but a Commoner, yet he may take the Cattle of the Lord there *Damage fesant*, and justify it in an Action of Trespass brought against him by the Lord of the Close where he took the Cattle; for it will be the worse Common, if the Lord may eat the Grass before the Common is to be taken by the Custom. *Mich.* 14 *Car. inter Trulock* and *White*, adjudged, this being moved in Arrest of Judgment.

Commoner may take them Damage fesant.

So where the Lord by Custom is stinted to a certain Number of Cattle, and yet he puts in more. *Yelv.* 129. *Vide Cro. Jac.* 208. 1 *Brownl.* 187, 188. In which Case some of the Judges doubted, whether as the Stinting the Lord was gained by Custom, a Custom and Usage to distrain ought not to be alledged; but how far the Lord may be restrained to a certain Stint, *vide* 2 *Roll. Abr.* 267. *Letter L.*

So where the Lord is stinted to a Number.

'Tis

'Tis said to be a general Rule, That in other Cases the Commoners cannot distrain or chase out the Cattle of the Lord or Tertenant *Damage fesant*; for which, see 2 *Leon.* 203. *Yelv.* 104, 105, 129. *Cro. Jac.* 208. 1 *Brownl.* 187, 188. *Godb.* 182. *General Rule.*

A Commoner in an Action of Trespass cannot justify his Coming there, with an Intent to put in his Cattle there, if he does not put them in. Adjudged, *Pasch.* 17 *Jac. B.R. int.* Sir *H. Spelman* and *Hermitage.* *Where Commoner may not justify his Intent.*

But the Commoner may justify his Coming to see if the Pasture in it be fit to receive his Cattle. *Pasch.* 17 *Jac. B. R.* *Where he may.*

If *A.* hath Common of Estovers in the Woods of *J. S.* and *J. S.* cuts Part, or all the Wood; yet *A.* cannot take any Part of this which is cut, but shall be put to an Assise or Case, as his Estate is. *P.* 17 *Jac. B. R. ut supra. Cro. Eliz.* 826. *Cro. Jac.* 257. 1 *Roll. Abr.* 567. *Pla.* 3. *Yelv.* 188. 1 *Brownl.* 197, 200. 1 *Bul.* 93, 94. *Vide* 9 *Co.* 112. 1 *Brownl.* 197. 1 *Roll. Abr.* 108. *Pl.* 22. 5 *Co.* 25. *Where Commoner of Estovers may not take Wood cut by the Grantor.*

So if one grants to me 1000 Cords of Wood to be taken at my Election, and the Grantor or Stranger cuts down all or Part of the Wood, *Or if cut by a Stranger.*

I can take no Part of that which is cut down. 5 *Co.* 25. Sir *Tho. Palmer's* Caſe. *Cro. Eliz.* 820. *Noy* 32. *Moor* 692. *Pl.* 955. *Yelv.* 188.

Where he may take Thornsout.

But if a Man claims all the Thorns, *&c.* growing in ſuch a Place, he may take them, though cut down by another. *Cro. Jac.* 257. *Yelv.* 188. 1 *Brownl.* 219, 220. 1 *Bulſt.* 93, 94.

Where a Common is ſurrounded with Water.

If a Common every Year in a Flood is ſurrounded with Water, yet the Commoner cannot make a Trench, in the Soil to avoid the Water, becauſe he has nothing to do with the Soil, but only to take the Graſs with the Mouth of the Cattle. 12 *H.* 8. 2. 13 *H.* 8. 15. *D.* 36 *H.* 8. 36. *b.* 39. *Vide* 2 *Bulſt.* 116. *Bridgman,* 10. *Godb.* 52.

Where he may not cut Buſhes, Fern, &c.

So the Commoner cannot cut Buſhes, Fern, *&c.* which impair the Common, (*Bridgm.* 10.) unleſs it be by ſpecial Preſcription; for if he makes any Thing *de novo* in the Land, he is a Treſpaſſer, but he may amend and reform a Thing abuſed. And therefore, if the Land be full of Mole-Hills, he may dig them down. 1 *Brownl.* 228. So if there be Holes dug in the Common to the Damage of the Land, they

May dig down Mole-Hills.

may

may put again the Earth dug into it's Place.

Approvement of Common concerning it.

By the Order of the Common Law, there be no Approvement, becauſe the Common iſſued out of the whole Waſte. 2 *Inſt.* 85. *Not by Common Law;*

By the Common Law, the Lord might approve againſt any that had Common Appendant, but not againſt a Commoner by Grant. 2 *Inſt.* 474. 1 *Roll. Rep.* 365. *unleſs by Common Appendant.*

By the Statute of *Merton*, *cap.* 4. becauſe great Men having enfeoffed others of ſmall Tenements in their great Manors, complained they could not make their Profit of the Reſidue of their Manors, as Waſte, Woods and Paſtures; It was provided, when ſuch Feoffees bring an Aſſiſe for their Common of Paſture, and it is alledged they have not ſufficient Paſture belonging to their Tenements, Ingreſs or Regreſs, the Truth ſhall be inquired by the Aſſiſe; and if found they have not ſufficient, *&c.* they ſhall recover Seiſin by the View of the Inqueſt, and by their Diſcretion ſhall have ſufficient, *&c.* but if found they *By the Statute of Merton.* *Inqueſt upon an Aſſiſe.* *Seiſin recovered.*

Profit of the Residue. have sufficient, *&c.* the other shall make the Profit of the Residue, and be quit of the Assise.

20 H. 3. This Statute was made 20 *H.* 3. See the Explanation thereof, 2 *Inst.* 85, 86. *Vaugh.* 257.

How Statute extends, &c. That it extends only to enable the Lord to approve against his Tenants, 2 *Inst.* 85. So it may be tried in an Action of Trespass. 2 *Inst.* 88. *Godb.* 117.

Upon Lord's Inclosure. Or if the Lord inclose any Part, and leave not sufficient Common in the Residue, the Commoner may break down the whole Inclosure. 2 *Inst.* 88.

Not to a Piscary, &c. It extends not to Common of Piscary, Turbary; Estovers, *&c.* 2 *Inst.* 87.

Not to Common in Gross. It extends not to Common in Gross. *Idem* 86.

Lord may approve the Residue. When 'tis found they have not sufficient, the Inquest shall find what is sufficient, that the Lord may approve the Residue, 2 *Inst.* 88. And though after it should prove insufficient, the Improvement continues. *Idem* 87, 88. See after.

By Inclosure. The Improvement is to be made by Inclosure, and not by digging for Coals, *&c.* 2 *Inst.* 87. 1 *Sid.* 106.

And

And if the Lord make a Feoffment of Part, his Feoffee may inclose; for the Feoffment in its Nature was an Improvement. 2 *Inst.* 17. *By a Feoffee.*

And thereby 'tis discharged of the Common, and if the Tenant purchase it, his Common is not extinguished. *Ibid.* *Purchase by Tenant.*

But the Lord cannot improve the whole, leaving them sufficient in other Lands. 2 *Co.* 25. *b.* *May not approve all.*

By the Statute of *Westm.* 2. *cap.* 46. the Statute of *Merton* shall bind Neighbours, and such as claim Common of Pasture appurtenant to their Tenements; but not such as claim Common by special Grant or Feoffment, for a certain Number, or otherwise. *Stat.* Westm. 2. *construes Stat. of* Merton.

A Neighbour is bound, though he dwell in another Town, so the Town and Commons adjoin. 2 *Inst.* 474. *How Neighbours are bound.*

And if the Lord hath Common in the Tenants Ground, the Tenants may improve within this Act. *Ibid.* And yet there seems as if the Common of the Lord was reserved upon the first Feoffment. *Ibid.* *Where the Tenant may improve.*

That by Occasion of a Windmill, Sheep-cote, Dairy, enlarging of a Court necessary for Curtilage, none shall *Concerning Windmills. Sheep-cotes,* &c.

ſhall be grieved by Aſſiſe of *Novel diſſeiſin* for Common of Paſture.

Houſe for a Beaſt-keeper.

Note, It's ſaid, theſe above are but for Examples; for the Lord may erect an Houſe for the Habitation of a Beaſt-keeper. 2 *Inſt.* 476. 1 *Lev.* 62. And it muſt be ſhewn that it was done for his neceſſary Reſiance. *Vide* 1 *Sid.* 97. 1 *Keb.* 283, 314. and whether of a neceſſary Curtilage it ſhould be an ancient one, *dubitatur*.

Though not ſufficient left.

And none in ſuch Caſes ſhall be grieved, though there be not ſufficient of Common left. 1 *Inſt.* 476. 1 *Lev.* 62.

Upon levying Dykes and Hedges, &c.

And where any having Right to approve, levies Dyke or Hedge, and it is thrown down in the Night or other Seaſon, *&c.* And it cannot be known by Verdict of Aſſiſe or Jury by whom, and the Men of the Towns near will not indict ſuch as are guilty of the Fact; the Towns near adjoining ſhall be diſtrained to levy the Hedge or Dyke at their own Coſts, and to yield Damages.

Reparation and Damages.

It is ſaid, That the cutting down of Timber is not within the Act. *Raym.* 487.

Publick Proſternation.

That if the Proſternation in the Day or Night was before the Face of the Owners, or ſo publick, that the

the Offenders may be known; it is not within the Act. 1 *Lev.* 108. a Traverse taken accordingly.

Inquisition, &c.

For the Inquisition and other Proceedings upon this Act, *vide Cro. Car.* 280,440,580. 1 *Jon.* 307. 1 *Sid.* 107, 212, 1 *Lev.* 108. 1 *Mid.* 66.

The Indictment, when.

And no Time being appointed for the Indictment, it's said it shall be intended within a Year and a Day. 2 *Inst.* 476. 1 *Roll. Rep.* 365. *Per Cro. Car.* 440. a convenient Time.

Action against bordering Towns.

That the Lord shall bring his Action upon this Statute against the Towns bordering round about the Town where the Fact was done; and Judgment shall be given, That they shall at their proper Cost make the Ditch, *&c.* 2 *Inst.* 477. 1 *Roll. Rep.* 365.

The Statute's confirm'd, &c.

And *per* 3 *Ed.* 6. *c.* 3. the Statutes of *Merton* and *Westminster* are confirmed, and treble Damages given to the Commoners that recover in such Assise against the Lord.

Admeasurement of Common.

Where it lies.

Concerning the Admeasurement of Common, and where it lies, *vide F. N. B.* 125.

It

By a Commoner. It lies by one Commoner againſt another; but if the Tenant ſurcharges the Common, the Lord ſhall not have a Writ of Admeaſurment againſt the Tenant. *Ibid. A. D.*

For a Common Appendant. *Per* 2 *Inſt.* 86. It lies only for and againſt ſuch as have Common Appendant. But *Q. & vide F. N. B.* 125. *D.* 1 *Roll. Rep.* 365.

All admeaſured. Upon the Suit of one Commoner againſt another, it's ſaid all the Commoners ſhall be admeaſured. *F. N. B.* 125. B.

Not againſt the Lord. So if the Lord ſurcharge the Common, or approve without leaving ſufficient, the Tenant ſhall not have a Writ of Admeaſurement againſt him, but an Aſſiſe. *F. N. B.* 125. *D.*

Not againſt Commoner ſans Number. That no Writ of Admeaſurement lies againſt a Commoner *ſans* Number, nor ſhall his Common be admeaſured; *Ibid.* But the Tertenant may diſtrain his Cattle. 1 *Saund.* 345.

Foreſt. *Vide* 1 *Lutw.* 98. That one may preſcribe for Common in a Foreſt for Sheep in the Fence-Month, but may not preſcribe for Goats. *Idem* 81.

Agreement for enclоſing the Common, decreed to be performed in Chancery. An agreement for encloſing the Common, and ſharing it among the Parties, decreed to be performed; but decreed alſo, That if there were any

any Perſons who had Intereſt in the ſaid Common, who were not Parties to that Agreement, they ſhould not be prejudiced thereby; provided that it ſhould not be in the Power of one or two wilful Perſons to oppoſe the publick Good. *Caſes in Chancery*, 1 *Par. f.* 48. *Thirveton* againſt *Collier*.

When Common may be taken in a common Field.

Where one has a Right of Common in a common Field, from the Time the Grain is carried off, until it is ſown again; the Sowing of a ſmall Parcel of ſuch Field ſhall not ouſt the Commoner from taking his Common in the Reſidue of the Field. *Mich.* 8 *Jac.* 1. *B. R. Trulick* and *Riggesby*. *Yelv.* 185.

CHAP.

CHAP. VIII.

Several Observations upon the Statute 29 Car. 2. *which was made to prevent Frauds and Perjuries, and relates to Bargains in buying and selling Goods and Chattels.*

Bargain of Goods above 10 l.

FIRST, It is to be observed, That no Leases, Estates or Interests, either of Freehold or Terms of Years, or any uncertain Interest (not being Copyhold or Customary Interest) of, in, to or out of any Messuages, Manors, Lands, Tenements or Hereditaments, shall be assigned, granted or surrendred, unless it be by Deed or Note in Writing, signed by the Parties so assigning, *&c.* or their Agents thereunto lawfully authorized by Writing, or by Act or Operation of Law.

Also, that no Contract for the Sale of any Goods, Wares, Merchandizes, for the Price of Ten Pounds Sterling, or upwards, shall be allowed to be good;

Goods delivered.

Except the Buyer shall accept Part of the Goods so sold, or actually receive the same.

Or

Or give ſomething in Earneſt to bind the Bargain, or in Part of Payment: *Earneſt.*

Or elſe that ſome Note or *Memorandum* in Writing of the ſaid Bargain be made and ſigned by the Parties to be charged by ſuch Contracts, or their Agents thereunto lawfully authorized: *Note or* Memorandum.

And if ſo done, the Action for the Money may be brought any Time within Six Years; (or after Six Years, if an original Writ be ſued out within Six Years.)

Alſo, That no Action ſhall be brought upon any Agreement that is not to be performed within the Space of one Year from the Making thereof: *No Performance after a Year.*

Nor whereby to charge any Executor or Adminiſtrator upon any ſpecial Promiſe to anſwer Damages out of his own Eſtate: *No Executor to anſwer, &c.*

Or whereby to charge the Defendant upon any ſpecial Promiſe to anſwer for the Debt, Default, or Miſcarriage of another Perſon: *Nor one for the Debt of another.*

Or to charge any Perſon upon any Agreement made upon Conſideration of Marriage. *Nor upon Conſid. of Marriage.*

Or upon any Contract or Sale of Lands, Tenements, or Hereditaments, *Or Contract of Lands.*

ments, or any Intereſt in or concerning them:

Unleſs a Note or Memorandum.

Unleſs the Agreement upon which ſuch Actions ſhall be brought, or ſome *Memorandum* or Note thereof, ſhall be in Writing, and ſigned by the Party to be charged therewith; or ſome other Perſon thereunto by him lawfully authorized.

Agreement not to deliver within a Year.

So that if the Agreement be for Goods, Wares, or Merchandize, under the Price of Ten Pounds; yet if by that Agreement they be not to be delivered within a Year,

Void without Writing.

That Agreement ſeems to be void, unleſs put in Writing, and ſigned by the Party to be charged thereby.

Earneſt there will not bind.

And though Earneſt be given upon ſuch an Agreement, not to be performed within a Year, it ſeems it will not help.

Receipt of Part will not bind for the Remainder.

Alſo if the Contract be for Goods, *&c.* above Ten Pounds; and though Earneſt be given, or Part of the Goods received; yet if the Remainder be by ſuch Contract to be delivered after a Year, this Contract (unleſs put in Writing, and ſigned) it ſeems will not bind for the Remainder. *Sed quære.*

And

And ſo if the Agreement or Promiſe be to do any other Thing or Things that are not to be performed in a Year's Time from the Making, it will not be binding unleſs ſuch Note or *Memorandum* be made. *No Agreement, &c. to be performed after a Year without Writing.*

But if no Day is ſet, or the Time is uncertain, as to pay ſo much at the Day of Death, *&c.* it is otherwiſe; for it does not appear but that might happen within a Year. *How if no Day be ſet.*

Again, if any Perſon promiſes to pay the Debt of another Perſon, or to anſwer for the Default or Miſcarriage of another Perſon: *To pay another's Debt &c.*

As if he ſhould ſay, Trouble not ſuch a Man, and I will pay you the Debt he owes you: *Example.*

Or, Truſt ſuch an one, and if he don't pay you, I will:

Or, If he don't do ſuch a Thing, I'll make you Satisfaction.

Theſe Promiſes, as aforeſaid, without a Note or *Memorandum* under Hand, will ſignify nothing, though it was at his Requeſt, and though you may alledge and ſhew a good Conſideration for it.

Alſo, if the Agreement be upon ſome Conſideration of Marriage; *Upon Conſideration of Marriage.*

As

Example. As, I will give you ſo much if you will marry my Daughter or Kinſwoman, *&c.*

Here the Marriage is made the Conſideration, and ſo void without Writing.

Exception. But to ſay, I will give you ſo much for ſuch a Horſe at the Day of my Marriage; this is otherwiſe, and good without Note: For the Horſe, in this Caſe, is the Conſideration of the Promiſe.

About Sale of Lands, &c. And if it be about the Sale of Lands, Tenements, or Hereditaments, or any Intereſt therein, it muſt be put in Writing under Hand as aforeſaid.

Example. As if a Man promiſe to ſell you ſuch a Houſe, Piece of Land, or the like:

Or to make a Leaſe for Years, or Life, of any Lands or Tenements: 'Twill not bind without Writing, *&c.*

To charge an Executor. And laſtly, not to charge any Executor or Adminiſtrator upon any ſpecial Promiſe to anſwer Damages, *&c.*

Example. As if an Executor or Adminiſtrator ſays to one that is about to ſue him for Money owing by the Teſtator, *&c.* Forbear your Suit, and I will pay your Debt. This Promiſe will

will not bind to make him answer Damages of his own Estate, unless it be put in Writing under Hand, *&c.*

Therefore every Agreement not to be performed within a Year; 1.

Every Agreement with an Executor concerning the Testator's Estate; 2.

Every Agreement to pay the Debt, *&c.* of another Person; 3.

Every Agreement, where Marriage is the chief Consideration; 4.

Every Agreement concerning the Sale of Lands, *&c.* must be put in Writing, and signed by the Party to be charged. 5.

So that in the Particulars above-named, it is absolutely necessary that there be some Note or *Memorandum* to make good such Contracts, Promises and Agreements. *Caution.*

Note, That by Stat. 7 *Jac.* 1. 12. None keeping a Shop-Book, his Executors or Administrators, shall be allowed to give it in Evidence for Wares or Work above one Year before the Action brought, unless they have obtained a Bond or Bill for the Debt, or brought an Action for the Money within one Year next *Shop-Book given in Evidence.*

next after the Wares delivered, or Work done.

But this Act is not to hold Place between Merchant and Merchant, Tradeſman and Tradeſman, or Merchant and Tradeſman, for any Thing falling within the Compaſs of their mutual Trades and Merchandize.

Concerning Notes promiſing Payment.

It may here be obſerved, from Statute 3 & 4 *Annæ*, c. 9. That all Notes ſigned by any Perſon, &c. whereby any ſuch Perſon, &c. ſhall promiſe to pay another Perſon, &c. or Order or Bearer, the Money mentioned in ſuch Note, ſhall be conſtrued to be, by Virtue thereof, due and payable to ſuch Perſon, &c. to whom the ſame is made payable.

Notes aſſignable over.

And alſo, ſuch Note payable to ſuch Perſon, &c. or Order, ſhall be aſſignable over, in Manner as Inland Bills of Exchange are. And the Perſon to whom ſuch Money is payable, may maintain an Action for the ſame, as they might upon ſuch Bill of Exchange. And the Perſon, &c. to whom ſuch Note ſo payable, or Order, is aſſigned or indorſed, may

may maintain an Action againſt the Perſon, &c. who ſigned, or any who indorſed the ſame, as in Caſes of Inland Bills, and recover Damages and Coſts of Suit: And in Caſe of Nonſuit or Verdict againſt Plaintiff, the Defendant to recover Coſts againſt the Plaintiff. *Damages and Coſts.*

See more in the Statute concerning Drawing, Accepting and Proteſting Inland Bills.

CHAP.

CHAP. IX.

Several neceſſary Matters relating to Farmers, and ſuch as keep and feed Sheep, and other Beaſts; as alſo relating to Actions for Nuſances done by one Tenant to another, &c.

None to take above two Farms.

BY 25 *H.* 8. 13. None ſhall receive or take in Farm for Term of Life, Years or at Will, by Indenture, Copy of Court-Roll, or otherwiſe, any more Houſes or Tenements of Husbandry, whereunto any Lands are belonging, in Town, Village, Hamlet or Tithing within this Realm, above the Number of two ſuch Holds or Tenements; and they are to be ſituate in the ſame Pariſh where he dwells, on Pain to forfeit to the King and Informer three Shillings and four Pence for every Week he takes the Profits of them.

How by Spiritual Perſons.

By Stat. 21 *H.* 8. 13. No Spiritual Perſon ſhall take to farm to himſelf, (or to any other for his Uſe) any Lands or other Hereditaments for Life, Years or at Will, on Pain to

forfeit ten Pounds for every Month he ſo continues the ſame, to be divided betwixt the King and the Proſecutor.

But this Act not to extend to any Spiritual Perſon, for taking any Archbiſhopricks, Biſhopricks, Abbies, Priories, or Collegiate, Cathedral, or Conventual Churches; nor to any ſuch Perſon who ſhall tender, or make any Traverſe upon any Office concerning his Freehold.

Parſonage or Vicarage.

The ſaid Act alſo provides, that no Spiritual Perſon ſhall take in Farm any Parſonage or Vicarage, on Pain to forfeit 40 *s.* for every Week that he or any other for his Uſe ſo occupies the ſame, and alſo ten Times the Value of the Profit or Rent that he makes thereof; both which Forfeitures are to be divided betwixt the King and the Proſecutor. See after.

Forfeiture.

Sheep keeping.

Alſo by 25 *H.* 8. 13. None ſhall keep in his own Poſſeſſion, at any one Time, above two thouſand Sheep, on Pain to forfeit for every Sheep kept above that Number 3 *s.* 4 *d.* to be proſecuted for a Subject within one Year, and for the King within three; but here Lambs ſhall not be accounted as Sheep till *Midſummer* Twelve-month after their Fall.

Exception. And if any happen to have more Sheep than two thouſand, by reaſon of any Executorſhip or Marriage, they ſhall not be impeached by this Law, ſo that in one Year after they put off ſo many, that at the End of the Year they may not have above two thouſand: Neither ſhall a Child, during his Nonage, (nor any Perſon for him) be endamaged by this Act, which Child ſhall have by Legacy above two thouſand Sheep given him.

Exception. But every Temporal Subject may keep (upon his own Demeſn Lands) as many Sheep as he will, or for the Maintenance of his Houſe, above the Number of two thouſand, notwithſtanding this Act.

Sixſcore pro Cent. A thouſand Sheep meant by this Statute, ſhall be accounted after the Rate of Sixſcore to the Hundred.

Fine. Juſtices of Peace have Power to hear and determine the Offences committed againſt this Act; but ſhall not take a leſs Fine than is limited by the ſame.

2 & 3 P. & M. c. 3. *Sheep-feeders.* And by the Statute of 2 & 3 *P. & M. c.* 3. Whoſoever ſhall feed above One hundred and twenty ſhorn Sheep for the moſt Part of the Year upon his Grounds, which be ſeveral and apt

apt for Milch Kine, and not Commonable, and ſhall not for every ſixty Sheep keep one Milch Cow; and moreover, for ſixſcore Sheep yearly rear one Calf during the Time of keeping ſuch Sheep, ſhall forfeit to the Queen and Informer for every Cow not kept, for every Month 20 *s.* and as much for every Calf not reared. *To keep Cows.*

Alſo, whoſoever ſhall feed upon his ſeveral Paſtures above twenty Oxen, Ronts, Steers, Scrubs, Heifers, Kine, and ſhall not for every ten Beaſts keep one Milch Cow, and for every two Kine wean and rear up yearly one Calf (except it die) ſhall forfeit as before; the Suit to be commenced within one Year after the Offence committed, and not to bind ſuch as keep Sheep, or feed Beaſts for their own Proviſion. Juſtices in their Seſſions have Power to hear and determine the Breach of this Statute. *Beaſt-feeders.*

The Stat. 27 *H.* 8. 6. provides for the keeping of Mares in Parks.

And 23 *H.* 8. 13. is made againſt keeping Stoned-Horſes (under ſize) upon Foreſt or Common Ground.

Several Actions on the Caſe, neceſſary to be known by all Farmers, &c.

Stopping up a Way. If one diſturb another in his Way to a Houſe or Land, by ſtopping or ſtraitening of it, or ſtop or turn his Water coming to his Houſe, Mill or Ground, or the Light to his Houſe, or if one ſtop a Ditch or River, or ſet up Flood-gates, ſo as to make the Water overflow and drown his Ground adjoining, he may have an Action of the Caſe againſt him for it. See after, Highway, Private way, *&c.*

Turning off Water. But if a Man ſtop or turn Water only to amend his Banks or Mills, having by Cuſtom or Uſe done it, this is juſtifiable. 4 *Co.* 86. 1 *Co.* 50. *Lit. Rep.* 267 1 *Vent.* 274. 2 *Vent.* 138, 185, 288, *&c.*

Drowning another's Ground. If one ſtop a Stream of Water and put it out of its old Courſe, and by that Means my Ground is drown'd, I may have an Action. *New Book of Entries, f.* 18. *Dyer* 248.

Diverting Water from a Mill. Where I have an ancient Mill, and an ancient Water-courſe to maintain it, if any Man ſhall divert it that I cannot have the Uſe of it to my Mill as formerly, I may have an Action

Action on the Caſe againſt him. *Style's Rep.* 370. 4 *Co.* 86. *Vide* 3 *Lev.* 133. 1 *Mod. Rep.* 48.

If one diſturb me in my Walk, Fold, or Foldage, Watering-place, Church-way, or High-way, Iſle or Seat in the Church, or any other Profit appendant which I have had Time out of Mind, as belonging to my ancient Houſe by Preſcription, I may have an Action. 4 *Co.* 32, 89. 5 *Co.* 1, 76. 12 *Co.* 105. 1 *Bulſt.* 47, 69. 2 *Bulſt.* 14, 129. *Bendl.* 89. *Diſturbing Walk or Foldage, &c.*

Action lies for not folding Sheep on the Plaintiff's Land, whereby the Plaintiff loſt the Benefit of Foldage. 2 *Vent.* 138. *For not folding his Sheep.*

If one diſturb me in my Common, that I cannot have it as liberally as formerly I have had, an Action lies. *Style's Rep.* 164. 1 *Cro.* 390. *Hetl.* 143. *Diſturbing Common.*

If one dig a Pit in a Place where I have Common, by Occaſion whereof my Beaſt there going falls in it and is hurt, I may have an Action. 2 *Cro.* 158. 1 *Vent.* 195. *Digging a Pit there.*

If one incloſe Land which ſhould lie open in a Manor, by which the Commoners have not enough for to common their Cattle, or eat up the Common ſo much that the Commoners have not enough; in this Caſe, *Incloſing Common.*

it's ſaid every Commoner may have his Action againſt him. *F.N.B.* 145. 9 *Co.* 113.

Watering-Place. If the Inhabitants of a Pariſh have a Watering-place by Preſcription, and be diſturbed in it, each of them, (as it ſeems) may have an Action for ſuch Diſturbance. 27 *H.*8. 27. *Finche's Ley*, 177.

Executor of Leſſee outed. If the Leſſor out me that am an Executor of the Leſſee for Years, or my Executors after me, of the Term, each may have an Action on the Caſe, or an *Eject. Firmæ.* 4 *Co.* 94.

Leſſor hindred to view. If the Leſſee keep out his Leſſor, coming to view his Houſe; if any Waſte be done, the Leſſor may have an Action againſt him. 2 *Cro.* 478.

Leſſee for Life againſt Leſſee for Years. If a Leſſee for Life make a Leaſe for Years, and the Leſſee for Years commits Waſte for which the Leſſee for Life is puniſhed; in this Caſe he may have an Action againſt the Leſſee for Years, and recover as much as the Leſſor doth or may recover of him. *Paſch.* 38 *Eliz. B. R. Gennie's* Caſe.

Leſſee againſt Leſſee. So if the Leſſee for Years of a Houſe leaſe it for Part of the Time, and that Time expire, and the Leſſee continue in full Poſſeſſion, and pull down Part of the Houſe, the

firſt

first Leſſee may have an Action of the Caſe againſt him. *Trin. 6 Car. 1. B. R.*

Leſſor's Neglect to pay, &c.

If my Leſſor that is bound by Law to repair my Houſe, or to pay Subſidies, or the like, neglect it, and I ſuffer thereby, I may have an Action on the Caſe againſt him. *Dyer, 36. pl. 37. 21 H. 7. 12.*

Tenant at Will.

So the Leſſor may have this Action againſt his Tenant at Will, for voluntary Waſte committed by him; but not for negligent or permiſſive Waſte. *5 Co. 13. Dyer 121. 14 H. 8. 12.* and therefore it has been adjudged, That where Tenant at Will ſuffered the Houſe to be burnt by the negligent Cuſtody of his Fire, this Action would not lie againſt him. *Cudlip* and *Rundle, Trin. 2 W. & M. Rot. 646.*

Tenant by Elegit.

But an Action on the Caſe lies againſt Tenant by *Elegit*, who holds over, or cuts Trees after the Money tendred. *21 E. 3. 16.*

Lord cutting down Copyholders Trees.

If the Lord cut down the Copyholder's Trees without his Leave, (or elſe a ſpecial Cuſtom of the Manor to enable him to it) the Copyholder may have Caſe againſt the Lord for it. *Mich. 3 Jac. B. R. Croſs* and *Abbot*; and *Trin. 17 Jac.* by Juſtice

Haughton, and this notwithſtanding he leave the Loppings of them.

Simile. Alſo, if the Lord cut down any Tree of his Tenant that is to have the Lops, and take it away, Caſe lieth. 1 *Brownl.* 97, 231.

Simile. If the Lord cut down all the Copyholders Trees, and not leave him Fire-wood, *&c.* Tenant may have Caſe againſt him. *Brownl. ibid.* 141, 197, 298. 2 *Brownl.* 57, 331.

Refuſing to grind. If the Tenant refuſes to grind at the Lord's Mill, as hath been uſed Time out of Mind, Action lieth againſt him. 1 *Vent.* 167. 2 *Vent.* 292. 1 *Saund.* 215.

Damage by Fire. For voluntary Firing his Houſe, whereby my Houſe is burnt, *vide Bendl.* 153 and 3 *Lev.* 359.

See the late Act at the End of this Treatiſe.

Notrepairing Fences. If one be Time out of Mind to repair a Hedge between my Cloſe and his, and he let it be unrepaired, that my Cattle go into his or other Men's Ground, or other Men's Cattle go into my Ground, by Reaſon of which I have Damage, I may have Action of the Caſe for it. 2 *Cro.* 699. 20 *Jac. B. R.* See 1 *Vent.* 264, 274, 275.

So

So if one be to repair or ſcour a Ditch, and do it not, by which my Land is drowned, or I have any ſpecial Damage, Caſe lieth againſt him. *F. N. B.* 93. *G.* 11 *H.* 4. 28. Action, *&c.* 30, 34, 36. *Not ſcouring Ditches &c.*

If one be to repair a Wall, or Bank of a River, and do it not, or doth it not ſufficiently, whereby my Land is drowned, I may have an Action *ſur le Caſe*. *Banks of a River, &c.*

But in theſe Caſes, and ſuch like, I muſt aver ſome ſpecial Damage to me, by the not Doing thereof. *Trin.* 20 *Jac. B. R.* 2 *Bulſt.* 280. *Special Damage.*

Alſo an Action of the Caſe will lie for me againſt him which ought to repair a Mound or Bank of the Sea, or of any great River, and doth it not, by which my Land is drowned ſo of the Bank of a River. 29 *Ed.* 3. 32. 12 *H.* 4. 7. 15 *Ed.* 4. 18. *Sea-Banks &c.*

Note, But if the Breach and Inundation be by any extraordinary Accident, as by Tempeſt, or the like, no Action lieth. 10 *Co.* 139. *Accident.*

If the Highway be to be repaired, by any ſpecial Perſon, and is not, and I have any ſpecial Damage thereby, I may have Caſe for it. 5 *Ed.* 4. 3. *Highway.*

If there be a Charge upon any Man, by Reaſon of the Tenure of his Houſe *Private Way not repaired.*

Houſe or Land, to repair any private Way, Bridge, Gutter, or the like, and he doth it not, and thereby I have any ſpecial Damage, Action lieth againſt him. *Old Book of Entries*, *f.* 10.

Houſe not repaired. So I may have an Action on the Caſe againſt one for not Repairing of a Houſe ready to fall on my Houſe. 22 *H.* 7. 98. *pl.* 4.

Diſturbance by an Upper Room. If one have a Room over me in a City, or other Place, and ſo carry himſelf in it as to annoy me that am under him; as if he have a Shop or Warehouſe over me, and I have a Cellar under it, and he lay ſuch an extraordinary Weight of Goods more than uſually have been, and ſo break it down upon me, I may have Caſe againſt him for it. *Poph.* 46.

Damage by an Under Room. If I have a Building beneath, and another Man a Building above me, and I ſuffer mine to decay ſo as to hazard his, or he ſuffer his to decay ſo as to hazard mine, each of us may have an Action on the Caſe againſt the other. *Keilw.* 48. See 1 *Brwnl.* 4.

Over-building. If a Man doth over-build my Houſe, ſo that his Houſe-Eaves do drop upon my Houſe, and cauſe it to periſh, or trouble my Dwelling, I may

have Action on the Caſe againſt him. 14 *Brownl.* and *Goldsb.* 4.

If a Man ſet up a Houſe upon a new Foundation ſo near to my ancient Houſe, that thereby he ſtops up my Windows and takes away my Light, the Air and Proſpect, I may have an Action on the Caſe. For a Man may not in *London*, or elſewhere, inlarge his Houſe in Breadth or Length to ſtop his Neighbour's Light; but upon an ancient Foundation he may build it as high as he will; for *cujus eſt ſolum, ejus eſt uſque ad Cœlum.* 5 *Co.* 10. 9 *Co.* 55. 56. See after; and ſee the Act for Rebuilding *London.* *Lights and Windows ſtopping.* London.

If a Man ſhall build or ſet up a Wall againſt the Window or Light of my Houſe, I may have an Action againſt him, albeit he build upon his own Ground. So if he ſet up a Wood-pile upon his own Ground to ſtop up Lights, I may have an Action. 9. *Co.* 54. 5 *Co.* 108. But if it prevent my Proſpect only, no Action will lie for this. *Co.* 8. 57. 1 *Mod. Rep.* 55. *Raym.* 87. 1 *Sid.* 167. *Wall, Woodpiles, &c.*

But if two Men be Owners of two Parcels of Land adjoining, and one of them build a Houſe on his Land, *Continuance of Lights and Windows.*

Land, and make Windows and Lights looking into the other's Lands, and this continueth thirty or forty Years, the other may build or lay any Thing upon his own Land, and ſtop them. 1 *Cro.* 118, 129. 1 *Bulſt.* 116.

Wrong purged. If one Houſe be built hanging over another wrongfully, and after they come both into one hand, the Wrong is now purged; ſo that if after they come into ſeveral Hands, neither Party is to complain of the Wrong done before. *Hob.* 173.

Nuſance by Dy-houſes, &c. *Note*, The erecting of a Dye-houſe, Tan-houſe, Brew-houſe, or Lime-kiln, may be a Nuſance to a Neighbourhood, by which if I have any conſiderable Offence in the Smell to my Health, or by the Smoke to our Bodies that live in the Houſe, or to Trees of the Garden or Yard, I may have an Action of the Caſe for my Relief. *Paſch.* 5 *Jac.* B. R. 5 *Co.* 73, 101, 108. 9 *Co.* 54.

Setting up a Pig-ſty, &c. So if one ſet up a Pig-ſty under my Houſe, and keeps Pigs in it, or a Houſe of Office, and uſe it ſo near to my Houſe that the Smell thereof doth annoy me, and hazard my Health, *&c.* I may have an Action. 5 *Co.* 73, 101, 108. 9 *Co.* 54.

So the Keeping of a Chandler's or Butcher's ſhop ſo near my Houſe, in a Place inconvenient, to the Offence of me in my Garden or Houſe, may be ſuch a Nuſance for which I may have an Action. *New Book of Entries, f.* 11. *Trin.* 13 *Car. B. R.* 5 *Co.* and 9 *Co. ut ſupra.* *Chandler's Shop.*

But if ſuch a Man ſhall ſet up his Trade by me, though this be offenſive to me, by the laying of ſtinking Heaps at his Door, and the like, I can have no Action for this, unleſs it be very great and much offenſive. 1 *Cro.* 367. 13 *H.* 7. 26. yet this is indictable. *Offenſive Trade.*

If one throw a Beaſt dying of the Murrain, or the Intrail or Offal of it into my Ground, whereby my Beaſts are infected and die, I may have Caſe againſt him. *Style's Rep.* 50. *Dead Carcaſſes, &c.*

If one ſet out his Tithes duly, and the Parſon will not take them away in convenient Time, Action lies. *By Tithes.*

So if one that hath bought Hay on my Ground, or in my Houſe, and ſuffer it to lie long whereby I am damaged. *Godb. Rep. pl.* 424. *Et ſic de ſimilibus. Quær.* *By Hay.*

CHAP.

CHAP. X.

Some further Obſervations relating to Covenants in Leaſes, &c. *With ſeveral modern reſolved Caſes relating to Pleadings in Covenants upon Leaſes.*

Alſo concerning the late Act of Parliament, to prevent Deſtruction of Houſes by Fire, and new building of Houſes within the Bills of Mortality.

Quiet Enjoyment.

A Covenant is either expreſſed in the Deed, or implied by Law; as by the Words *Demiſe* or *Grant*, the Law doth imply and intend that the Leſſee ſhall quietly enjoy during the Leſſor's Life. 4 *Co.* 8. *Dyer* 338.

Affirmative or Negative.

A Covenant may be in the Affirmative or in the Negative, and it may be executed, that is of a Thing already done; executory, *i. e.* of a Thing that ſhall be done hereafter: But if it be of a Thing preſent, it may be void; as if I covenant that my Houſe is yours, this is void. *Plowd.* 330.

Cove-

Covenants made by Deed Poll are as good and effectual as those made by Deed indented, so as the Party have the Deed to shew; but Covenant doth not lie upon a verbal Agreement, neither can it be grounded without a Writing, except by some special Case, as in *London*. 3 *Co.* 63. *By Deed Poll.*

There needs no great Formality in the Words to make a Covenant; for if the Words of a Deed run thus, *That the Lessee shall repair, provided always that the Lessor shall allow Timber*; or, *That the Lessee shall scour Ditches, provided that the Lessor do carry away the Earth*; also, *That the Lessee shall pay twenty Shillings a Year Rent*; or, *That the Lessee shall not alien*, and the like; these are said to amount to good Covenants on both Sides, *&c.* *Dyer* 57, 150. 2 *Co.* Lord *Cromwel*'s Case. *Words of Covenant.*

But regularly in all Cases, where Words that do begin the Sentence be Conditional, or have the Effect of a Condition, and do give another Remedy, there they shall not be construed to make a Covenant: Yet if Words of Condition and Words of Covenant be coupled together in the same Sentence, (as, *Provided always*, *Conditional Words*

and

and it is covenanted, and the like) in ſuch Caſes the Words may be conſtrued to make a Covenant and Condition both. *Bro. Cov.* 21, 26, 38.

Cauſe, &c. to be firſt performed.

And note, That where a Covenant is penn'd conditionally, and ſo as one Thing is the Cauſe of another, (as if one covenant to pay me 10*l.* if I ſerve him a Year; or to new build a Houſe ſo as he may have the old Materials) in all theſe Caſes, if the Cauſe or Condition be not obſerved, the Covenant ſhall not be performed. *Co. Lit.* 204. *Dyer* 371.

Lawful Matter.

Where the Subſtance and Matter of a Covenant to do any Thing is lawful, ſuch Covenant is good; and generally where a Condition for the Matter of it is good, a Covenant comprehending the ſame Matter is good alſo.

Matter unlawful.

But if the Matter required to be or not to be done by the Covenant be unlawful in the Subſtance thereof, then is the Covenant void, and doth not bind: So if the Covenant be impoſſible. *Dyer* 6, 13, 324, 251, 253.

Covenants, how taken.

A Covenant is to be always moſt ſtrongly taken againſt the Covenantor, and moſt in Advantage of the Covenantee.

To

To be taken according to the Intent of the Parties, &c. *Intent.*

When no Time is limited for the doing of the Thing, it ſhall be done in reaſonable Time, and the like. *Plowd.* 287. *Time.*

Any one that is Party to the Deed to whom the Covenant is made, may take Advantage of the Covenant, but not a Stranger. *By whom.*

As if *A.* covenant with *B.* to do an Act to *C.* who is no Party to the Deed, and he doth it not; *B.* and not *C.* muſt ſue him upon this Breach. *Stranger.*

And regularly all thoſe that do ſeal and deliver the Deed, and are named and bound by the expreſs Words of the Covenant, (whether it be collateral or inherent) are bound by the Covenant contained in the Deed. *Who bound.*

And therefore if Heirs, Executors, Adminiſtrators or Aſſigns, be named in the Covenant, for the moſt part they are bound by the Covenant. *Heirs, &c.*

And in all Caſes of inherent Covenants, *i. e.* that tend to the Support of the Thing granted, (in Reſpect of which it is preſumed the Leſſor took the Leſſee for the Land) where *Inherent Covenants.*

where a Man doth Covenant for himſelf only, and doth not name his Executors and Adminiſtrators, or either of them; yet they are bound, and may be charged by the Covenant notwithſtanding; and in ſome Caſes the Law is ſo alſo for collateral Covenants.

Run with the Land. And in moſt inherent Covenants, ſuch as have the Land, albeit they be neither Executors nor Adminiſtrators, or either of them, but *Aſſigns.* Aſſigns, *&c.* ſhall be charged by the Covenant, tho' they be not named, for theſe Covenants are ſaid to run with the Land. 5 *Co.* 16, 17, 18.

Covenant gone. Where the Deed it ſelf wherein the Covenants are contained, or the Eſtates on which the Covenants do depend, is gone and determined, there regularly the Covenants are gone alſo.

Breach. But the Surrender of a Leaſe doth not diſcharge the Breach of Covenant, which was before the Surrender. *Dyer* 10. 10 *Co.* 23.

Become impoſſible. Where a Covenant is become impoſſible to be done by the Act of God, by this the Covenant is diſcharged; as where *J.* Covenants to ſerve *B.* ſeven Years, and dies before

fore the ſeven Years be expired. 1 *Co.* 98. *Plowd.* 286.

Where there is an expreſs Covenant in a Deed for quiet Enjoyment, the implied Covenant is gone, 2 *Co.* 80. *Expreſs.*

By a Releaſe of all Covenants from the Covenantee, the Covenant is diſcharged, ſo as the Releaſe be by Deed, for a Covenant by Deed cannot be diſcharged by Word. Therefore if *A.* covenanteth with *B.* to build a Houſe by a Day, and in the mean Time *B.* doth bid or deſire him to let it alone; this doth not diſcharge the Breach of the Covenant; but the Leſſor may ſue for it notwithſtanding. *Paſch. 6 Car. B R.* *Releaſe of Covenants.*

Note, If there is only a Hand to a Writing, and not a Seal, Covenant lies not, but Caſe upon Agreement; and declare, that in Conſideration the Plaintiff had promiſed to perform the Agreement on his Part, the Defendant promiſed to perform on his Part, *&c.* and then Aſſign Breach, *&c.* *Writing not ſealed.*

Where in a Covenant, the later Words being general, ſhall be reſtrained and expounded by the former *Expoſition of Words. &c.*

mer which were ſpecial, *vide Saund. Rep.* 1 *par. fol.* 59, 60.

Where in a Covenant the former general Words ſhall be reſtrained and expounded by the later ſpecial Words, *Idem* 59.

In Covenant, the former general Words, That the Original Leaſe is indefeaſible, ſhall not be reſtrained by the later Words, That the Aſſignee *haberet, teneret & gauderet*, &c. without any Let, *&c.* of the Aſſignor. *Idem* 60.

A particular Covenant in a Deed, may reſtrain a general Covenant in Law. *Ibid.*

That he was ſeiſed in Fee.

Covenant that he was ſeiſ'd in Fee, (notwithſtanding any Act done) and that the Lands were of the yearly Value of 260 *l.* there the Words *Notwithſtanding, &c.* may not be applied to the Covenant concerning the Value. *Ibid.*

Aſſignee.

What Action of Covenant lies for an Aſſignee of a Reverſion at Common Law, *Idem* 238, 239.

Action of Covenant by an Aſſignee of a Reverſion againſt the Leſſee for Rent, need not to be laid in the County where the Land lies. *Idem* 239, 240, 241.

An

An Action lies for a Leſſor or his Aſſignee againſt the Leſſee, upon his Covenant for Payment of Rent, notwithſtanding that the Leſſor or his Aſſignee had accepted Rent before of the Aſſignee of the firſt Leſſee; for Covenant is not like an Action of Debt for Rent. *Idem* 240, 241. *Leſſor and Leſſee.*

If by a Deed ſealed by both Parties, it is agreed, that the Defendant ſhall give the Plaintiff ſuch a Sum for all his Lands in *A.* It will amount to a Covenant on the Part of the Plaintiff to convey the Land. *Idem* 230. *Agreement for Lands.*

Where Covenant lies upon the Word *Demiſe*, and where not, *Idem* 321, 322. *Demiſe.*

Where Covenant lies for *Misfeaſance*, but not for *Nonfeaſance*, *Idem* 322, 323. *Misfeaſance.*

If a Man by Deed grant a Watercourſe, and ſtop it, the Grantee may have an Action of Covenant. *Idem* 322. *Watercourſe.*

If one of the Parties covenant to aſſure Lands, and the other, in Conſideration of the ſame Covenant performed, covenant to pay a Sum of Money, he is not obliged to pay the Money until the Lands be aſſured, *To aſſure Lands.*

red, ——— But it is otherwiſe, if the Covenant had been in Conſideration of the Covenant to be performed. *Saund. Rep. 2 par. 156.*

Mutual Covenants. Where, in mutual Covenants the Words, *In Conſideration of the Performance thereof*, ſhall make a Condition precedent, and where not, *Id.* 156, 157.

Negative and Affirmative. If the Covenant of the one Part be negative, and the Affirmative Covenant on the other Part be in Conſideration of the Performance thereof; although the negative Covenant is broken, yet the affimative Covenant ought to be performed. *Idem* 157.

A negative Covenant is not ſaid to be performed, until it become impoſſibie to break it. *Ibid.*

Upon Warranty of Lands. In Covenant upon a Warranty of Lands for Years, the Plaintiff ought to ſhew what Eſtate or Right he that entred into the Lands had at the Time of his Entry; and it is not ſufficient to aver, that he had a good Title. *Idem.* 178, 179, 180, 181.

What Warranty ſhall be taken only for a Covenant, *Idem* 180.

An

An Action of Covenant lies against a Woman upon a Warranty by her and her Husband, annexed to her Estate for Years in a Fine. *Idem Ib.*

Where, by the Grant of a Reversion, the Rent reserved upon a Lease for Years is well transferred to the Grantee, the Law transfers also to him the Covenant of the Lease for the Payment of it, as incident to the Rent. *Idem* 371. *Covenant transferred.*

If in an Action of Covenant any Breaches are well assign'd, and others ill, and the Defendant demurs to the whole Declaration; the Plaintiff shall have Judgment for those Breaches that are well assigned, and for the Residue he shall be barr'd. *Id.* 380. *Breaches assign'd.*

Some resolved Cases as to Pleadings in Covenant upon Leases.

In Covenant against an Assignee for not repairing a House, Defendant pleaded in Bar an Accord between him and the Plaintiff, and Execution of it in Satisfaction of the Reparations It was objected, That neither Arbitrament, nor Accord with Satisfaction, is a Plea, when an *Breach for not repairing.* *Bar by Accord.*

an Action is founded upon a Deed, becauſe Matter *en Fait* cannot be avoided by Matter *in Pais*; ſo when an Action is in the Realty, or mixt with the Realty, Accord with Satisfaction is no Plea, and is not a Bar for the Perſonalty, but it was adjudged that the Plea was good: And a Difference was taken, where a Duty accrues by a Deed in a Certainty, as by Covenant, Bill or Obligation to pay a Sum of Money; there, becauſe it takes it's Eſſence by Writing, it ought to be avoided by Matter of as high a Nature: But when no certain Duty accrueth by the Deed, but a Default ſubſequent gives only Damages, there Accord with Satisfaction is a good Plea. 6 *Co. Blake's* Caſe.

And good.

Vide 2 *Keb p.* 51. The Court held That an Accord was a good Plea to a Covenant to pay a Sum certain, or an Obligation when joined with other Things uncertain. But Concord after the Deed, cannot be a Bar to ſuch Covenants as were not broken. 2 *Roll.* 187, 188.

Defendant pleads Payment after the Day, and good.

Moved for a Repleader in an Action of Covenant, to perform Articles and Payment of Money, whereto the Defendant had pleaded Pay-

Payment of the Money after the Day, which the Plaintiff accepted; and becauſe it was not pleaded by way of Accord and Satisfaction of the Covenant wherein Damages alſo are recovered, ſaid to be ill. And this Iſſue being inſufficient, and found for the Defendant, it's not aided by the Statute of *Jeofails*. And by *Twyſden*, Payment pleaded to a ſingle Bill, if found for the Plaintiff, he ſhall have Judgment; if for the Defendant, there ſhall be a Repleader; *ſed adjornatur*. 1 *Keb*. 210. *Vide* 3 *Cro*. 445. *pl*. 2. *Goldsb*. 100. *pl*. 11.

Bar, That the Houſe was burnt by Caſualty.

In Covenant brought againſt a Leſſee for Years, for not keeping the Houſe in Repair. The Defendant pleaded in Bar, That the Houſe was burnt by Caſualty; it was holden to be no good Plea in Bar, for that a Leſſee that covenanteth to repair, ought to do it, be his Houſe burnt by Negligence, or by any other Means. *Style* 162. *Crompton* and *Allen*'s Caſe. See at the later End of this Treatiſe.

Houſe repaired in convenient Time.

Defendant pleads, the Houſe was burnt, but repaired in convenient Time before Action brought: The Plaintiff demurred, becauſe not ſhewn

by whom, not by the Defendant himſelf: But the Court ſaid, That being repaired, though by a Stranger, was a good Plea; but in Truth the Plaintiff had repaired it, and becauſe it was a Hard Caſe, the Court ſuffered him to wave his Demurrer, and take Iſſue not repaired in convenient Time, the Houſe being uncovered. 2 *Keb.* 535.

Vide 3 *Keb.* 40. The like Plea and Demurrer, becauſe the Time not put in certain; *ſed non allocatur*, the firſt of *July* ſufficient.

2*dly*, Becauſe not ſaid who repaired; and *per Cur'*, The Houſe being rebuilt by the Plaintiff himſelf, and the Defendant's Executors and Adminiſtrators bound to repair it; the Plea is ill, and muſt ſhew who repaired it; for if the Plaintiff built it, this is no Excuſe; and Judgment for the Plaintiff.

Bar by Tempeſt: If a Leſſee for Years covenanteth to leave Wood in as good Plight as it was at the Time of the Leaſe, and afterwards the Trees are overturned by a Tempeſt, he may plead this Matter in Bar, and it ſhall diſcharge him of his Covenant, *quia impotentia*

And good.

tia excuſat Legem. 1 *Co. Shelly's* Caſe. 40 *Ed.* 3. 6.

Upon a Covenant in an Indenture of Leaſe, the Breach was for Non-payment of Rent. Defendant pleaded in Bar, that the Plaintiff entred into Part of the Land demiſed before the Rent was due, for which the Action was brought, and ſo had ſuſpended his Rent. Plaintiff replied, The Defendant did reenter, and ſo was poſſeſſed as in his former Eſtate. And it was held ill by the Court, becauſe the Plaintiff did not ſhew that the Defendant continued the Poſſeſſion till the Rent grew due, but only that he was poſſeſſed in his former Right; but the Plea in Bar was a good Plea, and Judgment againſt the Plaintiff, *quod nil capiat per Billam. Style* 243. *Page* and *Parr's* Caſe.

Breach for Non payment of Rent.

Bar by Entry.

Repl. Defendant entred and ill.

Bar good.

Bar by Aſſignment before Rent arrear.

Vide 3 *Keb.* 858. In Covenant, Breach for not repairing. Defendant pleads Entry into Part, and building, *&c.* Plaintiff demurred.

In Covenant againſt Defendants, Executors to *C.* Leſſee for Rent in Arrear in the Defendants Time. Defendants plead Aſſignment before Rent arrear. Plaintiff demurred —— *Per Cur'*, Tho' Debt may

be in the *debet & detinet* on the Executors Poſſeſſion, and then ſuch Aſſignment is a good Plea. *Contra* on expreſs Covenant, where the Executor is charged as ſuch; but if charged as Aſſignee only, then the Plea were good of Aſſignment before Rent arrear; and here Judgment muſt be *de bonis Teſtatoris*, therefore Judgment for the Plaintiff, *niſi* 3 *Keb.* 363.

Non locavit no Plea on a Leaſe of a Quarry by Indenture.

In an Action of Covenant on Demiſe of a Freeſtone-Quarry to the Defendant, the Defendant covenants not to dig in any other Part of the Common, and Breach being aſſigned in digging, Defendant pleads *non locavit* the Quarry *prædict'*; to which the Plaintiff demurs, the Demiſe being by Indenture, and the Covenant collateral, the Plea was held frivolous, and Judgment for the Plaintiff, *niſi.* 1 *Keb.* 715.

Departure.

In an Action of Covenant for not repairing a Houſe, the Defendant pleads Performance, and after rejoins, that he was ouſted by a Stranger, which *per Curiam*, on Demurrer of the Plaintiff, is a Departure. Judgment for the Plaintiff, *niſi. Idem.* 662.

Upon

Upon Covenant to pay Money, *Utlary* a good Bar. *Idem* 324. *Utlary pleaded.*

Non infregit Conventionem is tried where the Houſe is not repaired. *Idem* 575.

In an Action of Covenant for Rent Arrear on a Leaſe for Years, the Defendant pleaded a general Releaſe of all Demands, (which was made by Award on collateral Differences between them) made after the Covenant and before the Rent due: to which the Plaintiff demurred, for that the Cauſe of the Releaſe was particular and collateral. And Judgment for the Plaintiff, *niſi*. *Idem p.* 499, 510, 511. 2 *Cro.* 107, 486. *Mo.* 544. *Et vide Bridgm.* 124. *&* 20 *Aſſ.* 5 *General Releaſe of all Demands.*

See 3 *Keb.* 814 Releaſe of all Demands, Demurrer becauſe the Releaſe is particular, and bars not for a Covenant broken; ſo after Cauſe of Action by Battery, Releaſe of all Demands in perſonal Eſtate no Bar. 3 *Keb.* 418. A Covenant broken is not diſcharged by Releaſe to Executor of all Demands of perſonal Eſtate of the Teſtator. Simile.

In Covenant for Rent on *Nil debet* pleaded, the Plaintiff demurr'd ſpecially; becauſe albeit the Cove- Nil debet *and Demurrer.*

nant doth not alter the Rent, yet *Nil debet* cannot be pleaded. But the Court ſaid it was well enough. 2 *Keb.* 347.

Covenant to enjoy againſt lawful Impediment, is broken by Entry of one *Habeus Jus.* 3 *Keb.* 40. So by one *Clamans Jus*, and not ſaid *Legale. Idem* 163. Entry *Clamans Titulum*, not ſaid by Stranger, and ſince the Covenant, no Breach. 2 *Keb.* 146.

Covenant for quiet Enjoyment broke by Leaſe without Entry

In Covenant on Indenture, 8 *Oct.* 1652. of Demiſe to hold for 99 Years after the Death of *Z. K.* if three Lives ſo long live; Defendant pleads, That the Plaintiff *potuit uti*, and enjoy the Premiſſes without the Let of the Leſſor. To which the Plaintiff replies, that the Lands are and were Dutchy Lands, and that the King for Fine and Rent had deviſed the Reverſion to *H.* for 99 Years, if the three Lives live, by Reaſon whereof he could not enjoy. Defendant demurs, and Judgment for the Plaintiff: All this being confeſſed by the Demurrer, the Plaintiff needs not ſhew that he entred, but the Defendant ſhould plead it. 3 *Keb.* 162, 202.

Cove-

Covenant on two Deeds of former Husband of the Defendant's Wife, to cut Twelve of the beſt Trees, whereby the Plaintiff hath Election: And Breach is aſſigned, That before the Time the Defendant cuts down ſome of the Trees. Defendant ſaith, There were ſufficient ſtanding; to which the Plaintiff demurred. *Vide* 3 *Keb.* 477.

Releaſe.

Covenant no Duty, nor Clauſe of Action, till broken; and therefore not diſcharg'd by Releaſe of Actions. *Alleyn's Rep.* 39. *Vide antea.*

To perform Indentures, and ſave harmleſs.

Covenant to perform certain Indentures, and to ſave the Plaintiff harmleſs; he cannot plead generally Performance of Covenants, becauſe ſome may be in the Negative; and alſo he ought to ſhew how he ſaved him harmleſs. *Aleyn* 72.

Leaſe naught.

If the Leaſe is not good, there's no Covenant nor Breach. *Yelv.* 18, 19.

Leſſor and Leſſee.

Note, That all Covenants between the Leſſor and Leſſee are Covenants in Law, or expreſs Covenants. *Vaugh. Rep.* 118.

Reſtraint.

An expreſs Covenant reſtrains the general Covenants in Law. *Idem.* 126.

Quiet Enjoyment. Where the Covenant is to enjoy againſt one or more particular Men, and where againſt all men. *Idem* 127.

Simile. By a Coverant in Law, the Leſſue is to enjoy his Term againſt the lawful Entry or Interruption of any Man; but not againſt tortious Entries, becauſe the Leſſee hath his proper Remedy againſt the Wrong-Doers. *Idem* 118, 119.

Leſſee outed by a Stranger. If a Stranger who hath no Right outs the Leſſee, he ſhall not bring Covenant againſt the Leſſor, becauſe he hath Remedy by Action againſt the Stranger: But if he enter by elder Title, then he ſhall have Covenant, becauſe he hath no other Remedy. *Idem* 119, 120.

Outed legally. Though the Covenant is, That the Leſſee ſhall enjoy againſt all Perſons; yet he ſhall not have Covenant againſt the Leſſor, unleſs he be legally outed. *Idem* 119, 120, 121, 123.

Strangers. The Law will never adjudge that a Man covenants againſt the Wrongful Acts of Strangers, except the Words are full and expreſs. *Idem* 121.

When

When the Covenant is to enjoy against all Men, the Covenant is not expreſly to enjoy againſt tortious Acts, neither ſhall the Law ſo interpret it. *Idem* 123, 125. *Tortious Acts.*

What collateral Matters ſhall be implied upon a Covenant. *Vide* 1 *Ven. Rep. p.* 26, 44, 55. And ſee the Table of this Treatiſe. *Collateral Matters.*

Though a Covenant be made only to a Man, his Heirs and Aſſigns; yet if the Breach be in his Life-time, his Executors may bring the Action for Damages. *Idem* 176. *Damages.*

That a Covenant for quiet Enjoyment may bind, notwithſtanding a ſubſequent Act of Parliament to alter the Title. *Idem* 175, 176. *Quiet Enjoyment.*

In an Action of Covenant, the Defendant cannot plead, That the Plaintiff *tempore quo, nihil habuit in Tenementis*; though ſuch a Plea in an Action of Debt for Rent is good. 2 *Vent. Rep.* 99. *Plea.*

Covenant to repair a Houſe; if the Leſſee come without Licence after the Term ended to repair the Houſe, he is a Treſpaſſor. 2. *Roll.* 250. *To repair.*

Note, The Difference between Covenants in Groſs, and Covenants grounded upon a Leaſe, Covenants *Covenants in Groſs.*

having a Leaſe for their Foundation are within the *Proviſo* of the Statute of 13 *Eliz. cap.* 5. but not in Groſs. 2 *Roll.* 401.

Breach for not repairing.

In an Action of Covenant to repair, and ſo to leave the Premiſſes, the Breach was in 60 Rood, *&c.*

Bar.

Defendant Pleads, that one Barn was pulled down by the Plaintiff's Conſent; and as to the reſt, That they were repaired, and ſo left: To which the Plaintiff demurred generally. *Per* Chief Juſtice, He ſhould either have taken Iſſue, that he repaired the Particulars; or ſay, they were not in Decay, *modo & forma:* And the Parties agreed to take Iſſue on one of the Points. 2 *Keb.* 798.

Concerning

Concerning the late Act of Parliament, to prevent Deſtruction of Houſes by Fire, and new Building of Houſes within the Bills of Mortality.

BY Stat. *6 Annæ, cap.* 31. for preventing of Miſchiefs that may happen by Fire, it is enacted, that all Houſes built on old or new Foundations within the Bills of Mortality, ſhall have Party-Walls between, of two Bricks thick in the Cellar and Ground-Stories, and thirteen Inches thick upwards from the Foundation, and eighteen Inches above the Roof, and no Cornice of Wood ſhall be made in ſuch new Houſes; but Front and Rear Walls of ſuch new Houſes ſhall be built of Stone or Brick, to be carried two Foot and an half above the Garret Floor, and coped with Stone or Brick: And if any Houſes ſhall be built in the ſaid Places, contrary to the Intent of this Act, then the Owner and Head Builder undertaking ſuch Building, ſhall forfeit 50*l.* one Moiety to the Informer, the other

to

to the Poor of the Pariſh, to be levied by Warrant and Diſtreſs, &c.

That no Action ſhall be maintained againſt any in whoſe Houſe or Chamber any Fire ſhall accidentally begin; provided that nothing therein ſhall make void any agreement between Landlord and Tenant. Alſo by the ſaid Act, that if any Servant, through Negligence, ſhall cauſe any Houſe or Out-houſe to be fired, ſuch Servant being thereof convicted by Oath before two or more Juſtices of Peace, ſhall forfeit 100 *l.* unto the Church-wardens of the Pariſh, to be diſtributed amongſt the Sufferers, as to the Church-wardens ſhall ſeem juſt: Upon Non-payment, ſuch Servant ſhall be committed to ſome Work-houſe, by Warrant of one ſuch Juſtice, for eighteen Months, to be kept to hard Labour.

Proviſo between Landlord and Tenant.

There is alſo a Proviſo, that ſo much of this Act, as relates to the Indempnity of thoſe in whoſe Houſe any Fire ſhall begin, ſhall continue for three Years, and from thence to the End of the next Seſſion of Parliament.

But by an Act made 7 *Annæ*, for making the former Act more effectual, it is enacted, that the former Clauſe concerning Houſes to be erected and built either upon old or new Faundations, was not intended, or ſhall be conſtrued to extend, to Houſes to be built upon any Part of *London-Bridge*, but that the ſame may be erected and built with Wood and Timber, as hath been hitherto uſed.

And that all houſes to be built upon old or new Foundations, in any Place about *London* and *Weſtminſter*, or Places compriſed within the Weekly Bills of Mortality, (except Houſes on *London-Bridge*, and the River of *Thames* below *Bridge*) ſhall have Party-Walls between Houſe and Houſe wholly of Brick or Stone, except Door-Caſes, Windows, Lentils, Breaſt-Summers, Story-Poſts and Plates, of two Bricks thich at leaſt in the Cellar, and one Brick and an half thick upwards to the Top of the Garret-Floor, and all Gable-ends to be one Brick in length, and eighteen Inches above the Roof; and to have no Beams or Rafters lie or ſtand, or be in the Brick-Works of the Gable ends.

That

That all Party-Walls hereafter to be built, ſhall be built nine Inches on each Man's Ground, whether the old Party-Wall be Brick, Stone or Timber; and that the firſt Builders ſhall have Power to pull down the ſame, and build up the new Party-Wall as aforeſaid, and be paid by the Owner of the next Houſe after the Rate of 5 *l. per* Rod, as ſoon as he ſhall have built the ſaid Party-Walls: And for all Houſes hereafter to be built, that will not yield the Rent of twenty Pounds *per Annum* more than the Ground Rent, to be left to the Diſcretion of the Builders, provided that all Party-Walls for the ſame be built with Brick.

That all Chimney-Jambs and Backs, ſhall be nine Inches thick from the Cellars to the Roof; and all Withs the Inſide of ſuch Chimnies, four Inches and an half in Breadth; all the Funnels plaiſtered or pargeted the Inſide from the Bottom to the Top; all Chimnies to be turned or arched under the Hearth with Brick, (except upon a Ground-Floor;) and that no Timber ſhall lie nearer than five Inches to any Chimney, Funnel or Fire-place; and all Mantles between the Jambs

Jambs arched over with Brick; and no Wood or Wainſcot ſhall be plac'd or affix'd to the Front of any Jamb or Mantle of any Chimney, nearer than five Inches from the Inſide of ſuch Jamb or Mantle; and that all Gable-ends, called nine Inches thick in Party-Walls, be rendred on the ruffeſt Side: and that all Stoves and Boilers, Coppers and Ovens, that ſhall be ſet up with Brick or Stone, ſhall not be nearer than nine Inches at the leaſt to the adjoining Houſe, and no Timber to lie nearer than five Inches to any Fire-place or Flew.

That no Brick or Stone-Work in the Fronts, Party or Partition-Wal's of any Houſe, Tenement or other Building whatſoever, that ſhall be erected upon any new or old Foundation within the Cities of *London* and *Weſtminſter*, or their Liberties, ſhall be ſupported, depend or bear upon any Sort of Timber or Wood-Work, (excepting upon Piles and Planks, where they are abſolutely neceſſary for Foundations in marſhy and unſound Ground; and excepting likewiſe all Houſes upon *London-Bridge*) upon Pain that every Perſon ſo offending, ſhall for every ſuch Offence

ſence ſuffer Impriſonment for three Months without Bail or Mainpriſe.

That no Door-Frame or Window-Frame of Wood, to be uſed in any Houſe or Building, which ſhall be erected upon old or new Foundations, within the aforeſaid Cities of *London* and *Weſtminſter*, or their Liberties, (except Houſes on *London-Bridge*, and on the River of *Thames* below Bridge) ſhall be ſet nearer to the outſide Face of the Wall than four Inches.

THE

THE

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